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Volume 2 Issue 1 January 2015 ISSN : 2393 - 9338

This Journal is an academic and peer-reviewed publication

National Journal of Comparative Law

A Refereed Journal

Edited by: Prof. Manik Sinha

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National Journal of Comparative Law(NJCL) is a biannual and peer-reviewed Journal published by **JPMS Society** in Collaboration with **Academic and Research Publications**. **JPMS Society** is a Society registered under the Societies Registration Act and its **Registration No. is 1649/1986-87**.This journal is published from year i.e. 2014. The ISSN of the JOURNAL is 2393-9338.

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Registered under Societies Registration Act.

[Registration No. 1649/1986-87]

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NJCL

National Journal of Comparative Law

Volume 2, Issue 1, 2015

January 2015

Cite this volume as 2(1)NJCL(2015) and so on....

This Journal is an academic and peer-reviewed publication
(Print ISSN **: 2393 - 9338** *)*

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(Registered under Societies Registration Act.)
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National Journal of Comparative Law

Volume 2, January 2015 Issue 1, 2015

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ISSN : **2393 - 9338**

National Journal of Comparative Law

Volume 2, January 2015 Issue 1, 2015

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National Journal of Comparative Law

Volume No. 2 January 2015 Issue No. 1, 2015

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A SOCIO- LEGAL FOCUS ON THE PARADIGM OF AN INDEPENDENT JUDICIARY IN INDIA

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(Date of Receipt :23-06-2014; Date of Acceptance for Publication : 12-12-2014)

Abstract

The administration of justice is the prime task of any judicial system. Justice which is regarded as the heart and soul of a country must be administered without favor or fear. Hence judiciary should always try to remain as far as possible outside political purview or influence. Judicial Independence simply means that the judiciary-- as an organ of the government, should be free from influence and control of the two other organs i.e. the executive and the legislature. In administering justice and interpreting laws the judges must always be impartial and should act honestly. In the present day world, every democratic country puts a great store on the independence of the judiciary as a guarantee of individual freedom. A well-functioning, efficient and independent judicial system is an essential requirement for a fair, consistent and neutral administration of justice. Consequently, independence of judiciary is an indispensable element of the right to due process, the rule of law and true democratic set up.

Therefore, in this paper I would like to focus mainly on the system of Judicial Independence and its effectiveness in a democratic country and will try to analyse its role very critically considering the present system of governance of our country.

Key Words : Administration of Justice, Judicial System, Judiciary, Independence, Executive, Legislature, Individual Freedom, Due Process, Rule of Law etc.

Pages:11 References: 27

INTRODUCTION AND MEANING OF JUDICIAL INDEPENDENCE

"*The government may make a law to make judges accountable. We are not afraid of that. But it should not tinker with the very constitutional principle of judicial independence*"

----- S. H. Kapadia (Hon'ble Former Chief Justice of India)

In India, the question of independence of the judiciary has been a subject of heated national debate over the last many years. It has exercised the minds of legislators, jurists, politicians and the laymen. Both the supporters and the opponents have cogent arguments in support of their views. This question assumes great importance whenever the Supreme Court holds a particular Act or particular Clause of an Act passed by Parliament ultra vires of the Constitution or whenever Govern-

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ment supersedes any person while making appointments of judges of the High Courts or the Supreme Court. The supporters of absolute independence of the judiciary argue that in the absence of an independent judiciary, democracy cannot succeed. They point out that only an independent judiciary can safeguard the rights of the people as enshrined in the Constitution and thereby ensure the rule of law in the country. On the other hand, the opponents of the theory of the independence of the judiciary say that under our Constitution, it is not the judiciary but the Parliament which is supreme and sovereign. They feel that it is for the Parliament to lay down the laws and for the judiciary to interpret them. The judiciary cannot and should not usurp the powers of the Parliament. If the Parliament passes any laws for the economic and social upliftment of the people and establishment of a socialistic pattern of society, the judiciary should not strike down such laws and stand in the way of progress. Otherwise, the people might resort to revolution to bring about a change.[1]

The framers of the Indian Constitution at the time of framing of our constitution were concerned about the kind of judiciary our country should have. This concern of the members of the constituent assembly was responded by Dr. B.R. Ambedkar in the following words:[2]

"*There can be no difference of opinion in the House that our judiciary must be both independent of the executive and must also be competent in itself. And the question is how these two objects can be secured*".

The question that arises at first instance in our minds is that what made the framers of our constitution to be so much concerned about providing the separate entity to the judiciary and making it self-competent.[3]

The answer to this question lies in the very basic understanding that so as to secure the stability and prosperity of the society, the framers at that time understood that such a society could be created only by guaranteeing the fundamental rights and the independence of the judiciary to guard and enforce those fundamental rights. Also in a country like India, the independence of the judiciary is of utmost importance in upholding the pillars of the democratic system hence ensuring a free society. It is a well-known fact that the independence of the judiciary is the basic requisite for ensuring a free and fair society under the rule of law. Rule of law that is responsible for good governance of the country can be secured through unbiased judiciary.[4]

The idea of Independence of Judiciary was first propounded by French political philosopher, Montesquieu. He believed in the theory of separation of powers of the three branches of the Government- Legislature, Executive and the judiciary. First, it was first implemented by the fathers of the American Constitution who established an Independent judiciary in their country. Now the people of America are of the opinion that if any kind of fetter is placed on the Independence of judiciary, their rights and liberties might be endangered. The scene in U.K. is quite different where the parliament is supreme. Even then in U.K. where the judiciary is neither independent nor supreme, then also the way the judgements are given and functions are worked out seems to be inde-

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pendent and impartial. Till now there has been no big clash reported between the parliament and the judiciary. One of the differing features of the judiciary in U.K. is that the judiciary is not empowered to declare a law passed by their respective legislatures as unconstitutional. But in the U.S.A. and India the scene is different as the judiciary is vested with the power of judicial review. If today a law is passed by the parliament which is unconstitutional then, the judiciary can strike it down in the U.S.A. and India but not in the U.K. where the judiciary has no power to do so.[5]

In reality, an independent, impartial and fearless judiciary is a sine qua non (an essential element) for any nation which believes in democracy. Such independent judiciary is necessary for India which has a quasi-federal constitution. The very basic thing that is to be kept in mind is that until the judges are independent and plucky, they cannot perform their duty freely in order to protect the rights and liberties of the people. To maintain the faith of people in judiciary, the judges must be away from pulls and pressures.[6]

The picture of judiciary in India must not be forgotten. India is a democratic country in which the founding principle of democracy is followed, which means the government elected must be 'by the people, for the people and of the people'. The Constitution has provided some special power to the Supreme Court in order to safeguard various rights guaranteed to the people of India. For example, that there is violation of Fundamental Right by the state. Now the question arises that whose side will the judiciary take, the State or the victim? Now if the judiciary is independent then it will take the side of the victim, but if the judiciary is under the state control, then justice would be forgotten and the judiciary would be deemed to be on the side of the state. Thus in that case the justice would be forgotten.[7]

In the last few years the debate over the independence of the judiciary is a key issue to be dealt in the country. There are supporters and opponents of the topic and both have given very effective and sound arguments. These supporters and the opponents include eminent lawyers, politicians and jurists and also our very common man.[8]

In short, those who believe that there should be independent judiciary believe that Independent judiciary is the basic feature of the constitution and the rule of law can only be upheld by a supreme judiciary. While the opponents of this are of the view that Parliament is supreme and the powers of the judiciary must be limited. According to these people's view the judiciary must not stand in the path of economic and social reform in the country for the establishment of a socialistic society.[9]

INTERNATIONAL STATUTORY REGULATIONS RELATING TO INDEPENDENCE OF JUDICIARY[10]

According to the Charter of the United Nations the peoples of the world affirm, inter-alia, their determination to establish conditions under which justice can be maintained to achieve International Co-operation in promoting and encouraging respect for human rights and fundamental freedoms without any discrimination.[11]

Whereas, Universal Declaration of Human

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Rights enshrines in particular the principles of equality before the law, of the presumption of innocence and of the right to a fair and public hearing by a competent, independent and impartial tribunal established by law.[12]

International Covenant on Economic and Cultural Rights and on Civil and Political Rights both guarantee the exercise of those rights, and in addition, the Covenant on Civil and Political Rights further guarantees the right to be tried without undue delay. The International Covenant on Civil and Political Rights ("ICCPR") states the fundamental rights that belong to human beings everywhere. Amongst the rights stated are those in the section which contains "**Procedural Guarantees in Civil and Criminal Trials**". Article 14.1 says, relevantly:[13]

"All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law".

The seventh United Nations Congress on Prevention of Crime and the Treatment of Offenders, by its resolution, called upon the Committee on Crime Prevention and Control to include among its priorities the elaboration of guidelines relating to the independence of judges and the selection, professional training and the status of judges and the prosecutors. This was endorsed by the General Assembly resolutions in November 1985 laying down the 'Basic Principles on the Independence of Judiciary'.[14]

Article III, Section 1 of the U.S. Constitution establishes that "the judges, both of the Supreme and Inferior Courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office."[15]

The New Zealand judiciary, like its counterparts in other countries, recognises the importance of efficiency and value for money in the operation of the Courts and of providing assurance of this to the community".[16]

INTERNATIONAL JUDICIAL SYSTEMS[17]

According to a new Transparency International report: Corruption undermines judicial systems worldwide, released on 25/05/07, the majority of people in nearly all Southeast European countries consider their judicial and legal systems corrupt. "*When courts are corrupted by the greed or political expediency, the scales of justice are tipped, and ordinary people suffer. Judicial corruption means the voice of the innocent goes unheard, while the guilty act with impunity.*" **In its Global Corruption Report 2007:** Corruption in Judicial Systems, Transparency International distinguishes two categories of judicial corruption: political interference by the legislative or executive branch and bribery. According to a survey conducted between June and September 2006, the group said that the majority of respondents in 33 of the 62 countries polled described their national judiciary and legal system as corrupt. The report also stated that of the 8,263 people who had been in contact with the judicial system recently. More than one in ten had paid a

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bribe. The situation appears to be worst in Paraguay, where nearly 90% of the respondents have described their judiciary and legal system as corrupt. With less than 10% of Danes perceiving their judiciary as corrupt, Denmark is the cleanest of the 62 countries. In the SEE region, the percentage of people describing their country's judicial and legal system as corrupt ranges between 54% in Greece and slightly over 80% in Macedonia, which is 4th on the list. About 78% of Croats consider their judiciary to be corrupt, placing the country 7th on the list. Bulgaria is 9th, Turkey is 16th and Albania is 26th. Next comes Romania, then Serbia as 29th and Greece is 31st. Within the region, Kosovo is the only territory where fewer than 50% of the respondents described the judiciary and legal system as corrupt.[18]

In recent years, to clear backlogs in state courts, governments of different political persuasions in the Australian States, have resorted to the appointment of many acting judges. Busy legal practitioners and sometimes academics or retired judges agree to offer their services, in effect, part-time. Such appointments have practical advantages. Nobody doubts the integrity of the legal practitioners who have accepted appointment. But they run into serious problems of principle. The past Chief Justice of Australia (Sir Gerard Brennan) noted shortly before his retirement that "judicial independence is at risk when future appointment or security of tenure is within the gift of the Executive".[19]

NEED FOR AN INDEPENDENT JUDICIARY[20]

The basic need for the independence of the judiciary rests upon the following points:

- **To check the functioning of the organs:**[21] Judiciary acts as a watchdog by ensuring that all the organs of the state function within their respective areas and according to the provisions of the constitution. Judiciary acts as a guardian of the constitution and also aids in securing the doctrine of separation of powers.

- **Interpreting the provisions of the constitution:**[22] It was well known to the framers of the constitution that in future the ambiguity will arise with the provisions of the constitution so they ensured that the judiciary must be independent and self-competent to interpret the provision of the constitution in such a way to clear the ambiguity but such an interpretation must be unbiased i.e. free from any pressure from any organs like executive. If the judiciary is not independent, the other organs may pressurize the judiciary to interpret the provision of the constitution according to them. Judiciary is given the job to interpret the constitution according to the constitutional philosophy and the constitutional norms.

- **Disputes referred to the judiciary:**[23] It is expected of the Judiciary to deliver judicial justice and not partial or committed justice. By committed justice we mean to say that when a judge emphasizes on a particular aspect while giving justice and not considering all the aspects involved in a particular situation. Similarly judiciary must act in an unbiased manner.

COMPOSITION AND COMPONENTS OF THE INDEPENDENCE OF JUDICIARY

The independence of judiciary and the protection of its constitutional provisions

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are not achieved by a single act but rather over a period of time by a continuous struggle that takes place within the framework of the ongoing and the dynamic process. Therefore it may not be possible to lay down all the conditions in advance either in the constitution or otherwise which will ensure and secure perpetual independence of the judiciary. Such conditions will have to be checked and revised from time to time. A few conditions are, however, so basic to the independence of the judiciary that without them the judicial independence will not exist. Some of them may be assigned to the collective independence of the Judiciary as an institution, while others may be assigned to the independence of the independence of the individual judges.[24]

The most important aspect in the independence of the judiciary is its constitutional position. Just as the constitution provides the composition and powers of the legislature and, the executive, it should also provide for the judiciary. If the constitution vests the judicial powers with the Judiciary, so much the better. Otherwise the constitution may provide for the composition of the courts and their jurisdiction, and for the appointment, the term of office, and the tenure of the judges. The constitution must ensure a constitutional position of dignity to the judiciary. The constitution must also ensure administrative independence of the Judiciary, such as supervision and control over the administrative staff, preparation of its budget and maintenance of the court buildings. It must not prohibit adhoc tribunals and diversion of the cases from the ordinary courts, ensure the natural judge principle, ordain respect from and provide for separation of judge from the civil services, and prohibit diminution of judges' service conditions. Some of these matters may be entrusted to legislation; however there must be enough assurance in the constitution to the effect so that the judiciary is able to command respect in the eyes of the people and is able to attract the ablest persons as the judges.[25]

INDIAN CONSTITUTIONAL PROVISIONS

Many provisions are provided in our constitution to ensure the independence of the judiciary. The constitutional provisions are discussed below:[26]

- **Security of Tenure:**[27] The judges of the Supreme Court and High Courts have been given the security of the tenure. Once appointed, they continue to remain in office till they reach the age of retirement which is 65 years *in the case of judges of Supreme Court (Art. 124(2)) and 62 years in the case of judges of the High Courts (Art. 217(1)). They cannot be removed from the office except by an order of the President and that too on the ground of proven misbehavior and incapacity. A resolution has also to be accepted to that effect by a majority of total membership of each House of Parliament and also by a majority of no less than two third of the members of the house present and voting. Procedure is so complicated that there has been no case of the removal of a Judge of Supreme Court or High Court under this provision.*

- **Salaries and Allowances:**[28] The salaries and allowances of the judges is also a factor which makes the judges independent as their salaries and allowances are fixed and are not subject to a vote of the legislature. They are charged on the Consolidated Fund of India in case of Supreme Court judges and the Consol-

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idated Fund of state in the case of High Court judges. Their emoluments cannot be altered to their disadvantage (Art. 125(2)) except in the event of grave financial emergency.

- **Art 124(7) Prohibition on practicing before any court:** [29] No person who has held office as a Judge of the Supreme Court shall plead or act in any court or before any authority within the territory of India. This provision is there to ensure that there are no future allurements for the judgments considering which their justice delivery is compromised.

- **Powers and Jurisdiction of Supreme Court:** [30] Parliament can only add to the powers and jurisdiction of the Supreme Court but cannot curtail them. In the civil cases, Parliament may change the pecuniary limit for the appeals to the Supreme Court. Parliament may enhance the appellate jurisdiction of the Supreme Court. It may confer the supplementary powers on the Supreme Court to enable it work more effectively. It may confer power to issue directions, orders or writs for any purpose other than those mentioned in Art. 32. Powers of the Supreme Court cannot be taken away. Making judiciary independent.

- **No discussion on conduct of Judge in State Legislature / Parliament:** [31] Art. 211 provides that there shall be no discussion in the legislature of the state with respect to the conduct of any judge of Supreme Court or of a High Court in the discharge of his duties. A similar provision is made in Art. 121 which lays down that no discussion shall take place in Parliament with respect to the conduct of the judge of Supreme Court or High Court in the discharge of his duties except upon a motion for presenting an address to the President praying for the removal of the judge.

- **Power to punish for contempt:**[32] Both the Supreme Court and the High Court have the power to punish any person for their contempt. Art. 129 provides that the Supreme Court shall have the power to punish for contempt of itself. Likewise, Art. 215 lays down that every High Court shall have the power to punish for contempt of itself.

- **Separation of the Judiciary from the Executive:**[33] Art. 50 contains one of the Directive Principles of State Policy and lays down that the state shall take steps to separate the judiciary from the executive in the public services of the state. The object behind the Directive Principle is to secure the independence of the judiciary from the executive. Art. 50 says that there shall be a separate judicial service free from executive control.

- **The highly rigid process of impeachment:**[34]

Impeachment under Article 124(4) and (5): The same procedure applies to High Court Judges. Clause (4) of article 124 provides that a Judge of the Supreme Court shall not be removed from his office except by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity. *The*

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constitutional provision does not prescribe how this investigation is to be carried on.

It leaves it to Parliament to settle and lay down by law the detailed procedure according to which the address may be presented and the charge of misconduct or incapacity against the Judge investigated and proved. In America, the Judges of Supreme Court hold office for life. They can, however, be removed by impeachment in cases of treason, bribery on other high crimes and misdemeanour. In K. Veeraswami v. Union of India ((1991) 3 SCC 855: 1991 SCC (Cri) 734.) A five Judges Bench of the Supreme Court held that a Judge of the Supreme Court and High Court can be prosecuted and convicted for criminal misconduct. The word 'proved' in this provision indicates that the address can be presented by Parliament only after the alleged charge of misbehaviour or incapacity against the Judge has been investigated, substantiated and established by an impartial tribunal. The constitutional provision does not prescribe how this investigation is to be carried on.

In accordance with the above provision, Parliament has enacted the necessary law for the purpose. The Judges (Inquiry) Act, 1968 now regulate the procedure for investigation and proof of misbehaviour or incapacity of a Supreme Court judge for presenting an address by the Houses of Parliament to the President for his removal.

- **Transfer of Judges:**[35]

This provision is there in the constitution to immune the judges from unnecessary transfers used by the executives to harass public servants who are honest.

- **Judges Transfer Case 1**[36]

In the case of S P Gupta vs Union of India, 1982 Supreme Court unanimously agreed with the meaning of the word 'consultation'. It further held that the only ground on which the decision of the govt. can be challenged is that it is based on mala fide and irrelevant consideration. In doing so, it substantially reduced its own power in appointing the judges and gave control to the executive.

- **Judges Transfer Case 2**[37]

This matter was raised again in the case of SC Advocates on Record Association vs Union of India, AIR 1982. In this case, the SC overruled the decision of the S P Gupta case and held that in the matter of appointment of judges of high courts and Supreme Court, the Chief Justice should have the primacy and the appointment of the Chief Justice should be based on seniority. It further held that the Chief Justice must consult his two senior most judges and the recommendation must be made only if there is a consensus among them.

- **Judges Transfer Case 3**[38]

A controversy arose again when the Chief Justice recommended the names for appointment without consulting with other judges in 1999. The president sought advice from the Supreme Court (re Presidential Reference 1999) and a 9 member bench held that an advice given by the Chief Justice without proper consultation with other judges is not binding on the govt.

As of now, due to the decision in Judges

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Transfer Case 2, the appointment of the judges in Supreme Court and High Courts are fairly free from executive control. This is an important factor that ensure the independence of the judiciary.[39]

IMPLICATIONS OF INDEPENDENCE OF JUDICIARY[40]

Judicial Review and Judicial Activism

- JUDICIALREVIEW[41]

In many countries with written constitution, there prevails the doctrine of Judicial Review. It means that constitution is the Supreme law of the land and any law inconsistent with it is void the courts perform the side of expounding the provisions of the constitution and exercise power of declaring any law or administrative action which may be inconsistent with the constitution as unconstitutional and hence void this judicial function stems from the feeling that a system based on a written constitution can hardly be effective in practice without an authoritative, independent and impartial arbiter of constitutional issues and also that it is necessary to restrain governmental organs from exercising powers which may not been sanctioned by the constitution. Judicial Review has two prime functions:

(i) Legitimizing governmental action.
(ii) To protect the Constitution against any under encroachments by the Government.

So, under the Indian Constitution, it is the Judiciary which is entrusted with the task of keeping organ of the state within the limits of the law and thereby making the rule of law meaningful and effective. The Judiciary in India has to act as impartial in order to reduce the disputes between the Governments and the private individuals as well as between the governments inter se. It has also to protect the fundamental rights of the Individuals guaranteed under part III of the constitution. The courts in the country have already expanded the scope of the judicial review by bringing in its ambit social, economic and political Justice. Keeping in view this expanding horizon of judicial review, it is the paramount need of the time that the Judiciary must be independent from executive pressure or influence.

- JUDICIAL ACTIVISM[42]

The Supreme Court identified Art. 142 of the Constitution as an unlimited source of power, a veritable Kamadhenu, on which it could draw for whatever the Judges felt, were the demands of the justice. In seeking the aid of the poor, the illiterate and the disadvantaged sections of the society, the post 1980 court emigrated upon a path of judicial activism unparalleled in the history of any modern democracy. It became a center of political power. Activist lawyers and Public Interest groups invoked its jurisdiction. As a result, there was no area of political or social action into which the Supreme Court did not deliver its verdict. It did with its craftsmanship, it was able to achieve those goals which even the government was unable to achieve, and did in a year that which government would not have been able to do in a decade it dealt with illegal mining, pollution in the Ganges, guidelines for the adoption of Indian children abroad, forced prostitution of girls and devdasis and jogins, the extreme poverty and starvation in Kalahandi, the eliminate of injuri-

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ous drugs and maintenance of approved standards in drugs, employment of children in match factories, sexual harassment of women in the work place and numerous other serious concerns in other areas of life in country.

CRITICISMS AGAINST JUDICIAL INDEPENDENCE

Are judges above the law? Who will judge the judges? How do you make judges more accountable? The difficulty arises from the fact that the Independence of Judiciary is one of the most important pillar on which democracy lies. Rightly, the framers of our Constitution had this principle uppermost in their mind while they were creating the structures of the three most important organs of the state – the legislature, the executive and the Judiciary. The fear is that any move to create a mechanism to make the judges more accountable has the risk of interfering with the judicial independence.[43]

However, the Indian Constitution is also guided by the principle of check and balance. What it means is that power and responsibility is distributed between the three organs of the state in such a manner that each organ of the state keeps a check on the other and stops the other from transgressing its authority or working in a fashion which is opposed to or divergent from the purpose for which it has been created. Most of us know about the role played by judiciary when Indira Gandhi had imposed the Emergency in the country. In same manner the legislature and the executive have played important role on a number of occasions to persuade the other organ to do its duty in the rightful manner or prevent it from going the wrong way. It is here that we have a hope of finding some answer if the judiciary on its own does not to find a remedy to the malady of corruption. However, it is not a very healthy method to root out the problem which the judiciary is facing today as it may lead to host of other problems.[44]

It can be noticed that, in many a times public criticized the role regarding the functioning of the judiciary. The public criticism includes among others, the delay in disposal of cases; unsatisfactory judgments and creeping corruptions in some quarters. The judiciary cannot afford to be indifferent to these criticisms. The cost of providing justice is like other calls on the public revenues. All persons and departments who utilize the public revenue are accountable to the public. The judges cannot be an exception to this recognized principle. They are equally accountable for their acts and omissions both on the Bench and off the Bench. It is therefore, necessary for the judges, individually and collectively, to ensure that no criticism is leveled against them or against the system.[45]

In Global Corruption Report 2007- Corruption in Judicial Systems: Transparency International distinguishes two categories of judicial corruption: political interference by the legislative or executive branch and bribery. Transparency International also offers a number of recommendations to improve judicial independence and combat corruption. These includes judicial appointments made by the independent panels, making judges' appointments based on merits, and mak-

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ing salaries in the sector reflect magistrates' experience and performance. Furthermore, judges should receive limited immunity for actions related to judicial duties and allegations against them should be rigorously investigated by an independent panel.[46]

Former Chief Justice of Supreme Court of India, J.S. Verma said regarding the accountability of the judges, "**There is no point in saying that there is no corruption in the judiciary. No one is going to say it much less accepted. One cannot go on sweeping it under the carpet and not accept it to show**."..... "**When moral sanction doesn't work, then legal sanction is required**."[47]

Citing the example of Shiv Prasad Sinha, a judge of Allahabad High Court, he said, "**There were allegations against him and the finding was that some judgments of his appeared to be made for extraneous considerations....**" At a meeting of the Supreme Court on May 7th, 1997 two resolutions were adopted. One, that the Chief Justice should devise an '**in-house procedure**' for enforcing accountability. And two, all judges should declare their assets. The '**in- house procedure**' is also stuck now because there is no mode of enforcement. Justice Verma said that accountability of judiciary is key to its independence. "*Judicial independence means independence from your own infirmities. Latent dangers are more lethal. Unless you have fearless and independent judges, judicial independence is a myth..... If in a court of 20 there are 2 judges whose integrity for good reason is doubtful, I think it is a very serious threat.*" In a recent decision, the Supreme Court has reiterated the high standard of moral and ethical behaviour expected from a judge, and the desirability of a suitable '**in-house procedure**' to maintain discipline among judges by self-regulation.[48]

'In most present-day Western political systems the authority of governmental institutions is no longer self-evident. The role of modern judiciaries has substantially changed over the years; its bearing and weight as a law maker has increased vis-à-vis the administration and the legislature due to the growing complexity of society. The original legitimization of judicial action lies in the independent role of judge as an arbiter operating under the rule of law, judging conflicts, supervising and reviewing state actions, this new judiciary is activist, with new responsibilities in the field of law making and even policy making. New judiciaries like this, partly performing on the political platform, can no longer be totally shielded by judicial independence from public control and public accountability. If we want the rule of law values to be effective in a new setting, new forms of control and accountability for the judiciary may be warranted. Transparency, openness, a more efficient delivery of justice, and new forms of interaction between politics and judiciary are the modern buzzwords in debates on the accountability and legitimacy of non-elected organizations.[49]

Is the Judiciary actually free?[50]

Having pondered upon various ways in which our founding fathers and other legislators have tried to insulate the judiciary from external executive influence, now the question which remains is Judiciary actually free? Or is it bound by many internal

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factors as opposed to external ones.

Post retirement Executive Offices:[51]

As we know Judges are offered many post retirement offices like the chairmanship of National Human Rights Commission and Press Council of India and others. It would not take rocket science to assume that these are allurements even if some are honorary in nature.

Other example is the office of the interstate river dispute Commission which extends to 3-5 years and is considered as a paid holiday for judges. Judges are humans with weaknesses and if such opportunities are up for grabs, it won't be impossible for few to compromise of their morals.

Lobbying [52]

Every Coin has two sides to it, when we support that Chief Justice of India and Chief Justice of Supreme Court and High Courts respectively should have the final call for selecting judges, it also has a negative side to it, the phenomenon of Lobbying of 'Uncle Judges' phenomenon.

Since now the selection after the 3rd Judge transfer case has been completely internalized, therefore there is high profile lobbying for seat birth in High Courts and Supreme Courts.

What is the solution then, in the words of an eminent Professor of Law, **Dr. H.C. Hajare**, "*I think the creation of a judicial commission is the only solution to the various controversies in the appointment of Judges.*"[53]

JUDICIAL ACCOUNTABILITY AND INDEPENDENCE OF JUDICIARY

One aspect of judicial independence which is often overlooked is that judges must also be independent from each other. A proper system of judicial administration will provide for presiding judges and court officials to organise the business of the members of courts and tribunals efficiently, economically and justly as between different members. But in the performance of the central role of decision-making, a member of a court or tribunal will not be independent if he or she can be directed by a superior colleague on how to decide a matter. Nor will the judge enjoy independence of mind if he or she can be effectively removed from the performance of the judicial function by the simple expedient of rostering the judge off work. If that were to become common, the court or tribunal in question would not be constituted in accordance with law. The formal procedures for discipline and removal from office would then be set at naught.[54]

In many states, the threat to judicial independence will not lie in direct confrontation between other branches of government and other powerful interests (on the one hand) and the judiciary (on the other). There are countries of the world where judges and lawyers are intimidated, oppressed and prevented from performing the duties necessary to their offices and even killed for doing their duty. Those in doubt should read the Annual Reports of the Centre for the Independence of Judges and Lawyers established by the International Commission of Jurists, titled

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Attacks on Justice. Those reports collect, and annually review, the case studies which are assembled in Geneva relating to attacks on judges and lawyers. Those attacks can range from brutal intimidation and murder to much more subtle and insidious interventions by the state and other powerful interests designed to reduce the independence of mind and action of the members of courts and other tribunals.[55]

ACT WITHIN LIMITS [56]

There will be no crisis to the judiciary if the legislative acts within its limit. Litigants, including various authorities and Governments, should accept the words of the judiciary as the final one in case of disputes. At the same time, there have been instances when the judiciary has overstepped its limits to direct the legislature to make a law. If each individual and authority follows a ` line of control' as regards its functioning and acts within the realm of law, crisis can be avoided.

SUGGESTIONS [57]

- Periodic increase in remuneration of the judges and other judicial staff.
- Permanency in office for judges of good behavior, physical and mental capability.
- A more standardized and stringent process for judicial impeachment of tainted judges.
- Inducting '**rule of law**' values for transparency, effectiveness and openness of judges.
- Enhancement of powers of Judicial Review and widen the scope of Judicial Activism.

Presently, our Parliament is thinking of bringing Judicial Standards and Accountability bill; so, we need to look into its provisions minutely whether this will try to put some restrictions on the judicial independence or this bill will minimize all the lacunaes existed there in the system of our Judiciary .

CONCLUDING REMARKS

In a democracy, the role of judiciary is crucial. Judiciary is a faithful keeper of the constitutional assurances. An independent and impartial judiciary can make the legal system vibrant. Our Indian judiciary can be regarded as a creative judiciary. Credibility of judicial process ultimately depends on the manner of doing administration of justice. Justice K. Subba Rao explains the function of the judiciary as thus.[58]

- It is a balancing wheel of the federation;
- It keeps equilibrium between fundamental rights and social justice;
- It forms all forms of authorities within the bounds;
- It controls the Administrative Tribunals.

Justice – Social, economic and political is clearly laid down in the preamble as the guiding principle of the constitution. Social justice is the main concept on which our constitution is built. Part III and IV of Indian constitution are significant in the direction of Social Justice and economic development of the citizens. Judiciary can promote social justice through its judgments. In other sense, they are under an obligation to do so.

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While applying judicial discretion in adjudication, judiciary should be so cautious. And prime importance should be to promote social justice.[59]

Supreme Court had itself suggested in one of the early and landmark case (Bandhu Mukti Morcha v Union of India 1984) I SCC 161, 234) that:[60]

There is a great merit in the court proceedings to decide an issue on the basis of strict legal principle and avoiding carefully the influence of purely emotional appeal. For that alone gives the decision of the court a direction which is certain and unfaltering, and that especial permanence in legal jurisprudence which makes it a base for the next step forward in the further progress of the law. Indeed both certainty of substance and certainty of direction are indispensable requirement in the development of the law and invest it with credibility which commands public confidence in its legitimacy.[61]

The Court must take care to see that it does not overstep the limits of its judicial function and trespass into areas which are reserved to the executive and the legislature by the constitution. Clear violation of constitutional or statutory provision must be interfered by the apex judiciary. If a considered policy decision has been taken which is not in conflict with any law or is not malafide, it will not be in Public Interest to require the court to go into and investigate those areas which are the function of the executive. When two or more options or views are possible and after considering them the government takes a policy decision it is then not the function of the court to go into the matter a fresh and in a way, sit in appeal over such a policy decision (Balco v. Union of India (2002) 2 SCC 333) .whatever method adopted by judiciary in adjudication, it must be the procedure known to the judicial tenets.[62]

It is proper to conclude with the note adopted by Justice Ranganatha Misra in the case of Dr. P. Nalla Thampy Thera v. Union of India as follows:[63]

"*We think it proper to conclude our decision by remembering the famous saying of Herry Peter Broughan with certain adaptations*":[64]

"*It was the boast of Augustus that he found Rome of bricks and left it of Marble*"[65]

"**But how noble will be the boast of the citizens of free India of today when they shall have it to say that they found law dear and left it cheaper; found it sealed book and left it a living letter; found it the patrimony of the rich and left it the inheritance of the poor; found it the two edged sword of craft and oppression and left it the staff of honesty and the shield of innocence.**"[66]

"*It is only in a country of that order that the common man will have his voice heard*".[67]

REFERENCES

1. Essay on independence of judiciary in India by Barnali Mondal, available on *http://www.shareyouressays.com/3085/926-words-essay-on-independence-of-judiciary-in-india* browsed on dated 08.06.2014 at about 10.48 A.M

ISSN : 2393 - 9338

2. INDEPENDENCE OF JUDICIARY IN INDIA: A CRITICAL ANALYSIS, ATIN KUMAR DAS LL.M 1st YEAR NATIONAL LAW INSTITUTE UNIVERSITY BHOPAL, available on *http://mulnivasiorganiser.bamcef.org/?p=482* browsed on dated 08.06.2014 at about 10.46 A.M.
3. Ibid.
4. Ibid.
5. 5. Independence of Judiciary by AKSHAY SRIVASTAVA, available on *http://legaldesire.com/2013/08/12/independence-of-judiciary/* browsed on dated 08.06.2014 at about 10.46 A.M.
6. Ibid.
7. Ibid.
8. Ibid.
9. Supra Note [8].
10. INDEPENDENCE OF JUDICIARY by JUSTICE VIJENDER JAIN, (Former Chief Justice, Punjab & Haryana High Court, INDIA), available on *www.iadllaw.org/.../VIJENDER%20JAIN%20INDEPENDENCE%20OF...* Browsed on dated 08.06.2014 at about 11.08 A.M
11. Ibid.
12. Ibid.
13. Ibid.
14. Supra Note [13].
15. Ibid.
16. Ibid.
17. Ibid.
18. Supra Note [17].
19. Ibid.
20. Supra Note [4].
21. Ibid.
22. Ibid.
23. Ibid.
24. Independence of Judiciary—Indian Experience by Raghvendra Singh Raghuvanshi & Nidhi Vaidya available on *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1558979* browsed on dated 08.06.2014 at about 10.58 A.M.
25. Ibid.
26. Supra Note [23].
27. Ibid.
28. Ibid.
29. INDEPENDENCE OF JUDICIARY, Essay and Analysis by PRATIK PATNAIK available on *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2250316* browsed on dated 08.06.2014 at about 10.55 A.M
30. Supra Note [28].
31. Supra Note [30].
32. Ibid.
33. Ibid.
34. Supra Note [29].
35. Supra Note [34].
36. Ibid.
37. Ibid.
38. Supra Note [37].
39. Ibid.
40. Supra Note [25].
41. Ibid.

ISSN : 2393 - 9338

42. Supra Note [41].
43. Supra Note [19].
44. Ibid.
45. Independence of Judiciary- Some Latent Dangers, available on *http://www.legalserviceindia.com/article/l273-Independence-of-Judiciary.html* browsed on dated 08.06.2014 at about 11.03 A.M
46. Ibid.
47. Supra Note [46]
48. Ibid.
49. Ibid.
50. Supra Note [39].
51. Ibid.
52. Ibid.
53. Ibid.
54. Supra Note [44].
55. Ibid.
56. Ibid.
57. Ibid.
58. The Role of Judiciary in India, available on *http://www.publishyourarticles.net/eng/articles/functions-of-judiciary.html* browsed on dated 08.06.2014 at about 11.06 A.M
59. Ibid.
60. Ibid.
61. Supra Note 60.
62. Ibid.
63. Ibid.
64. Ibid.
65. Ibid.
66. Ibid.
67. Ibid.

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DAUGHTER'S DEFICIT IN INDIA: A DISCOURSE FROM LEGAL PERSPECTIVE

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(Date of Receipt :04-07-2014; Date of Acceptance for Publication : 12-01-2015)

Abstract

Ŵomen of today are Doctors, Engineers, Pilots, Advocates, Scientists, Journalists, Teachers, Administrators, Judges, State Governors, Political leaders, Professors, Ambassadors, President of India, Chief Ministers, Prime Minister, Speaker of Lok Sabha, and what not. In almost all fields they are performing well. But, their exploitation, miseries, sufferings, discriminations, tortures and harassment are still continued. Female foeticide and infanticide are two forms of such social evils which are widening daughter's deficit in our country. These are two heinous crimes and serious human rights issues which pose a serious threat to our society and these are the main reasons for daughter's deficit in our country. Female foeticide is perhaps one of the worst forms of violence against women where a women is denied her most basic and fundamental rights. The Government, NGO, and other Social Organization should take steps to enhance mass awareness regarding ill effect of female feticide and infanticide.

Key Words : Female Foeticide, Violence Against Women, That Gender Gap, Dowry System, Governmental Initiatives, The Pre-Natal Diagnostic Tech., Act, 1994 .

Pages:12 References: 20

INTRODUCTION

Incident-I:

"Mr. Madan Prasad Singh's daughter, Arti from Muzaffarpur, Bihar, was married to Sanjiv Kumar Singh in 2005. When Arti became pregnant after a year, her in-laws learnt through an ultra sound that she was carrying a baby girl. They pressurised her to go for an abortion but she refused on the ground that it was her first issue. Arti, then, was tortured by her in-laws time and again after she gave birth to a baby girl. She was confined inside a closed room, insulted and thrashed on trifling issues. It was on the night of September, 13, 2013; her in laws first hit her on her head with a blunt weapon and then poured kerosene oil on her body. But, before she could be set ablaze, Arti's daughter raised alarm and called neighbours who prevented in-laws from doing so. "

Incident-II:

"Enraged with his wife consecutively giving birth to two daughters, an employee

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of a city-based export house allegedly strangled her and smothered their two girls, two years and six months old. Their bodies were found in the family's house in Bhangel, Phase-II, Noida. The husband Amit has gone missing and police has arrested his father and two brothers. "

Yes, these two incidents are only tips of the iceberg which have taken place in two parts of our country. Endless incidents of like nature are taking place every day across our country very few of which are reported. Mother Terresa, Leymah, Ellen, Tawakul, Smt.Indira Gandhi, Benazir Bhutto, Jullia Gillard, Sheikh Haseena, Smt. Prativa Devi Singh Patil, Heena Rabbani Khar, Queen Elizebeth, Rani Laxmibai, VijayaLaxmiPandit, Kiran Bedi, Kalpana Chawla, Sunita William, P.T. Usha, Elizabeth Blackwell, Hillary Clinton, Sonia Gandhi, IndraNooyi, Mirabai, Queen Victoria, Florence Nightingle, Marie Curie, Helen Keller, Annie Besant, Margaret Thatcher –the list is endless and each and every woman in this list is world famous in her own field. Had they not allowed to be born, it would have been an irreparable loss to our society, nation and the entire humanity at large. Women of today are Doctors, Engineers, Pilots, Advocates, Scientists, Journalists, Teachers, Administrators, Judges, State Governors, Political leaders, Professors, Ambassadors, President of India, Chief Ministers, Prime Minister, Speaker of Lok Sabha, and what not. In almost all fields they are performing well. But, their exploitation, miseries, sufferings, discriminations, tortures and harassment are still continued. Female foeticide and infanticide are two forms of such social evils which are widening daughter's deficit in our country. These are two heinous crimes and serious human rights issues which pose a serious threat to our society and these are the main reasons for daughter's deficit in our country. These two are social cancer which is eating into the vitals of our society. These are devastating and calculative social evils which may bring about catastrophe to our entire civilization. Female foeticide is perhaps one of the worst forms of violence against women where a women is denied her most basic and fundamental rights. The girl child has often been a victim to the worst forms of discrimination. Gender bias, deep rooted prejudices and discrimination against the girl child have led to many cases of female foeticide in the country. Strong male preference, religious fanaticism coupled with progress in science and technology has caused this menace.

Female infanticide is the deliberate and intentional act of killing a female child within one year of its birth either directly by using poisons- organic and inorganic, chemicals or indirectly by deliberate neglect to feed the infant by either one of the parents or other family members or neighbours or by the midwife. In fact, this kind of attitude is rooted in a complex set of social, cultural and economic factors. It is the dowry system, lack of economic independence, social customs and traditions that have relegated the female to a secondary status . Statistics suggests that gender gap between male and female in India is widening day by day in spite of governmental initiatives, legislative enactments and judicial directions. According to a report, between 42 lakh and 1.21 crore female foetuses were selectively aborted in the country in the last three decades and wealthy and educated families are increasingly going for abortion of

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the second girl child if their first born too was a girl. As per 2013 Global Gender Gap Index released by the World Economic Forum, India ranked a lowly 101st of 136 countries, including huge disparity in access of women to economic, political, educational and healthcare opportunities and their participation in such services .

However, it is in this national and social spectacle I have ventured to write this article. I have tried to highlight the present Indian scenario with the help of statistical data. I have highlighted relevant legislative provisions and judicial developments in this context. The author has tried to find out the real causes of these evils. Finally, the author has also made some suggestions to eradicate these evils.

LEGISLATIVE DEVELOPMENTS IN INDIA

The cult of female foeticide and infanticide was prevalent in India from very earlier days. But, the gravity of the offence and number of incidents has increased now due to various factors including advancement of science and technology. When there was no ultra sound machine, people used to kill girl child after their birth. But, now, because of early detection by the ultra sound machine, girl child are killed even in the womb and before their birth. The practice of killing girl child in the womb is adopted by even educated and reasonably well educated and rich families rather than poor families . However, in order to prevent this barbaric and inhuman evil practice of female foeticide, where the dignity of women is ravished even before their birth, government of India enacted the The Pre-Natal Diagnostic Techniques (Regulation and prevention of Misuse), Act, 1994. The Act was amended in 2002. The amendment of the Act and the rule took place keeping in view the emerging technology for selection of sex before and after conception and problems faced in the working of implementation of the Act and directions of the judiciary in various cases. The object of the Act is to provide for the prohibition of sex selection before or after conception, and for regulation of prenatal diagnostic techniques for the purpose of detecting genetic abnormalities or metabolic disorders or chromosomal abnormalities or certain congenital malformations or sex-linked disorders and for the prevention of their misuse for sex determination leading to female foeticide . However, these aims and objects are fulfilled through the implementation of various provisions of the Act. Some of these are discussed as below.

Section 2(i) of the Act defines “pre-natal diagnostic procedures”. The term means all gynaecological or obstetrical or medical procedures such as ultrasonography, foetoscopy, taking or removing samples of amniotic fluid, chorionicvilli, blood or any other tissue or fluid of a man, or of a woman for being sent to a Genetic Laboratory or Genetic Clinic for conducting any type of analysis or pre-natal diagnostic tests for selection of sex before or after conception. Section 2(j) defines “pre-natal diagnostic techniques”. It includes all pre-natal diagnostic procedures and pre-natal diagnostic tests. Section 2(k) defines “pre-natal diagnostic test”. The term means ultrasonography or any test or analysis of amniotic fluid, chorionic villi, blood or any tissue or fluid of a pregnant woman or conceptus conducted to detect genetic or metabolic disorders or chromosomal abnormalities or congeni-

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tal anomalies or haemoglobinopathies or sex-linked diseases. Section 2(o) defines the term "sex selection". It includes any procedure, technique, test or administration or prescription or provision of anything for the purpose of ensuring or increasing the probability that an embryo will be of a particular sex. According to the Act, no Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic unless registered under this Act, shall conduct or associate with, or help in, conducting activities relating to prenatal diagnostic techniques . The Act also says that no Genetic Counselling Centre or Genetic Laboratory or Genetic Clinic shall employ or cause to be employed or take services of any person, whether on honorary basis or on payment who does not possess qualifications as may be prescribed . The act says that no medical geneticist, gynaecologist, paediatrician, registered medical practitioner or any other person shall conduct or cause to be conducted or aid in conducting by himself or through any other person, any pre-natal diagnostic techniques at a place other than a place registered under this Act .As per the Act, no person, including a specialist or a team of specialists in the field of infertility, shall conduct or cause to be conducted or aid in conducting by himself or by any other person, sex selection on a woman or a man or on both or on any tissue, embryo, conceptus, fluid or gametes derived from either or both of them . The Act says, no person shall sell any ultrasound machine or imaging machine or scanner or any other equipment capable of detecting sex of foetus to any Genetic Counselling Centre, Genetic Laboratory, Genetic Clinic or any other person not registered under the Act . The Act specifically says , that on and from the commencement of this Act,— (a) no Genetic Counselling Centre or Genetic Laboratory or Genetic Clinic shall conduct or cause to be conducted in its Centre, Laboratory or Clinic, pre-natal diagnostic techniques including ultrasonography, for the purpose of determining the sex of a foetus; (b) no person shall conduct or cause to be conducted any pre-natal diagnostic techniques including ultrasonography for the purpose of determining the sex of a foetus; (c) no person shall, by whatever means, cause or allow to be caused selection of sex before or after conception.

As per the Act, no person shall open any Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic, including clinic, laboratory or centre having ultrasound or imaging machine or scanner or any other technology capable of undertaking determination of sex of foetus and sex selection, or render services to any of them, after the commencement of the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, 2002 unless such centre, laboratory or clinic is duly registered under the Act. The Act prohibits advertisement relating to pre-natal determination of sex and says, inter alia, that no person, organization, Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic, including clinic, laboratory or centre having ultrasound machine or imaging machine or scanner or any other technology capable of undertaking determination of sex of foetus or sex selection shall issue, publish, distribute, communicate or cause to be issued, published, distributed or communicated any advertisement, in any form, including internet, regarding facilities of pre-natal determination of sex or sex selection before conception avail-

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able at such centre, laboratory, clinic or at any other place . The Act also says that no person or organization including Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic shall issue, publish, distribute, communicate or cause to be issued, published, distributed or communicated any advertisement in any manner regarding pre-natal determination or pre-conception selection of sex by any means whatsoever, scientific or otherwise . Again Section 22(3) of the Act says that any person who contravenes the provisions of sub-section (1) or sub-section (2) shall be punishable with imprisonment for a term which may extend to three years and with fine which may extend to ten thousand rupees. The Act clearly says that, any medical geneticist, gynaecologist, registered medical practitioner or any person who owns a Genetic Counselling Centre, a Genetic Laboratory or a Genetic Clinic or is employed in such a Centre, Laboratory or Clinic and renders his professional or technical services to or at such a Centre, Laboratory or Clinic, whether on an honorary basis or otherwise, and who contravenes any of the provisions of this Act or rules made there under shall be punishable with imprisonment for a term which may extend to three years and with fine which may extend to ten thousand rupees and on any subsequent conviction, with imprisonment which may extend to five years and with fine which may extend to fifty thousand rupees . The Act also directs that the name of the registered medical practitioner shall be reported by the Appropriate Authority to the State Medical Council concerned for taking necessary action including suspension of the registration if the charges are framed by the court and till the case is disposed of and on conviction for removal of his name from the register of the Council for a period of five years for the first offence and permanently for the subsequent offence .

JUDICIAL DEVELOPMENTS

In Centre for Enquiry into Health and Allied Themes(CEHAT) and others vs. Union of India and others Hon'ble Supreme Court held that "it is unfortunate that for one reason or the other the practice of female infanticide still prevails despite the fact that the gentle touch of a daughter and her voice has a charming effect on the parents. One of the reasons may be the marriage problems faced by the parents coupled with the dowry demand by the so called educated and /or rich person who are well placed in the society. The traditional system of female infanticide whereby the female baby was done away with after birth by poisoning or letting her choke on husk continues in a different form by taking advantage of advanced medical techniques. Unfortunately, developed medical science is misused to get rid of a girl child before birth. Knowing fully well that, it is immoral and unethical as well as it may amount to an offence; foetus of a girl child is aborted by qualified and unqualified doctors or compounders. This has affected overall sex ratio in various States where female infanticide is prevailing without any hindrance". However, hon'ble court gave the following directions in this case:

DIRECTION TO THE CENTRAL GOVERNMENT

(a).The Central Government is directed to create public awareness against

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the practice of prenatal determination of sex and female foeticide through appropriate releases/programmes in the electronic media. This shall also be done by the Central Supervisory Board ("CSB" for short) as provided under Section 16(iii) of the PNDT Act.

(b). The Central Government is directed to implement with all vigour and zeal the PNDT Act and the Rules framed in 1996. Rule 15 provides that the intervening period between two meetings of the Advisory Committees constituted under sub-section (5) of Section 17 of the PNDT Act to advise the appropriate authority shall not exceed 60 days. It would be seen that this Rule is strictly adhered to.

Directions to the Central Supervisory Board (CSB)

(a). Meetings of CSB will be held at least once in six months [re proviso to Section 9(1)]. The constitution of CSB is provided under Section 7. It empowers the Central Government to appoint ten members under Section 7(2)(e) which includes eminent medical practitioners, including eminent social scientists and representatives of women welfare organizations. We hope that this power will be exercised so as to include those persons who can genuinely spare some time for implementation of the Act.

(b). CSB shall review and monitor the implementation of the Act.

(c). CSB shall issue directions to all States/UT appropriate authorities to furnish quarterly returns to CSB giving a report on the implementation and working of the Act. These returns should inter alia contain specific information about:

(i) survey of bodies specified in Section 3 of the Act;

(ii) registration of bodies specified in Section 3 of the Act;

(iii) action taken against non-registered bodies operating in violation of Section 3 of the Act, inclusive of search and seizure of records;

(iv) complaints received by the appropriate authorities under the Act and action taken pursuant thereto;

(v) number and nature of awareness campaigns conducted and results flowing therefrom.

(d). CSB shall examine the necessity to amend the Act keeping in mind emerging technologies and difficulties encountered in implementation of the Act and to make recommendations to the Central Government (re Section 16).

(e). CSB shall lay down a code of conduct under Section 16(iv) of the Act to be observed by persons working in bodies specified therein and to ensure its publication so that the public at large can know about it.

(f). CSB will require medical professional bodies/associations to create awareness against the practice of prenatal determination of sex and female foeticide and to ensure implementation of the Act.

Directions to State Governments/UT Administrations

(a). All State Governments/UT Administrations are directed to appoint by notification, fully empowered appropriate authorities at district and sub-district levels and also Advisory Committees to aid and advise the appropriate authorities in discharge of their functions [re Section 17(5)]. For the Advisory Committee also, it

is hoped that members of the said Committee as provided under Section 17(6)(d) should be such persons who can devote some time to the work assigned to them.

(b). All State Governments/UT Administrations are directed to publish a list of the appropriate authorities in print and electronic media in their respective States/UTs.

(c). All State Governments/UT Administrations are directed to create public awareness against the practice of prenatal determination of sex and female foeticide through advertisement in print and electronic media by hoardings and other appropriate means.

(d). All State Governments/UT Administrations are directed to ensure that all State/UT appropriate authorities furnish quarterly returns to CSB giving a report on the implementation and working of the Act. These returns should inter alia contain specific information about:

(i) survey of bodies specified in Section 3 of the Act;

(ii) registration of bodies specified in Section 3 of the Act;

(iii) action taken against non-registered bodies operating in violation of Section 3 of the Act, inclusive of search and seizure of records;

(iv) complaints received by the appropriate authorities under the Act and action taken pursuant thereto;

(v) number and nature of awareness campaigns conducted and results flowing there from.

Directions to appropriate authorities

(a). Appropriate authorities are directed to take prompt action against any person or body who issues or causes to be issued any advertisement in violation of Section 22 of the Act.

(b). Appropriate authorities are directed to take prompt action against all bodies specified in Section 3 of the Act as also against persons who are operating without a valid certificate of registration under the Act.

(c). All State/UT appropriate Authorities are directed to furnish quarterly returns to CSB giving a report on the implementation and working of the Act. These returns should inter alia contain specific information about:

(i) survey of bodies specified in Section 3 of the Act;

(ii) registration of bodies specified in Section 3 of the Act including bodies using ultrasound machines;

(iii) action taken against non-registered bodies operating in violation of Section 3 of the Act, inclusive of search and seizure of records;

(iv) complaints received by the appropriate authorities under the Act and action taken pursuant thereto;

(v) number and nature of awareness campaigns conducted and results flowing therefrom.

(d). CSB and the State Governments/Union Territories are directed to report to this Court on or before 30-7-2001. List the matter on 6-8-2001 for further directions at the bottom of the list.

In CEHAT and Others vs. Union of India Hon'ble court held that there was total slackness by the admin-

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istration in implementing the PNDT Act. Court also was of the view that those centres which were not registered were required to be prosecuted by the authorities under the provisions of the Act and there was no question of issue of warning and to permit them to continue their illegal activities.

In CEHAT and Others vs. Union of India Hon'ble court gave the following directions:

In ***Hemanta Rath vs. Union of India and Others*** [23] Hon'ble court directed that if Appropriate Authorities as contemplated under Section-17 of the PNDT Act and as defined under Section 2(a) of the said Act has been constituted, such Authority must act strictly in terms of the provisions of the said Act. If, however, such Committee has not been constituted, such Committee must be constituted within a period of six weeks from the date of service of the order upon the Chief Secretary of the State. After constitution of the said Committee, it must take strict measures to implement the provisions of the said Act. The said Act has been enacted to serve public purpose and the Constitutional end as is clear from the object of the Act quoted hereinabove. Therefore, the State is under both a statutory and Constitutional obligation to implement the provisions of the said Act.

In ***Vinod Soni and Anr. Vs. Union of India*** , a very interesting argument was advanced in this case by the Petitioner that the right to life guaranteed under Article 21 of the Constitution includes right to personal liberty which in turn includes the liberty of choosing the sex of the offspring and to determine the nature of the family. Therefore, it was contended that the couple is entitled to undertake any such medical procedure which provides for determination or selection of sex. The High Court however exposed the fallacy of this argument by observing that, "right to personal liberty cannot be expanded by any stretch of imagination to liberty to prohibit to coming into existence of a female or male foetus which shall be for the nature to decide." Hon'ble Court also held that, Article 21, cannot include right to selection of sex, whether preconception or post-conception. It was observed by the High Court that "this Act is factually enacted to further the right of the child to full development as given under Article 21. A child conceived is, therefore, entitled under Article 21 to full development, whatever be the sex of that child."

In Dr. Preetinder Kaur and Others Vs. The State of Punjab and Others it was contended that the Act contemplated the proceeding to be initiated in particular fashion on a complaint by the appropriate Authority, but the said procedure had not been followed. The person who had filed the complaint had never been authorized by the Appropriate Authority for taking any action; therefore the entire trial which was in progress before the Magistrate was vitiated. High Court rightly rejected this contention by giving

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broader interpretation to Section 28 of the Act. It was held that Section 28 does not narrow down the class of persons who can initiate action. On the other hand, it allows for fairly large body of persons to set the law in motion. Apart from the Appropriate Authority, an Officer authorized by the Central or State Government can also file a complaint. He can also be a person authorized by the appropriate Authority itself. As per the Explanation contained u/s 28, the expression 'person' includes even a social organization. The various categories of persons which are set out u/s 28 give authority to a wide range of persons who can initiate the action under the Act. It was further held that Section 28 must not be read as constituting a narrow class of persons who could initiate the action. It must be given an extensive meaning to pave the way for any socially conscious person to initiate action. It was accordingly held that the complaint filed by the Project Officer was not illegal but it was only irregular and the subsequent discussion and recording of minutes by Appropriate Authority constituted valid ratification.

In M/S Malpani Infertility Clinic Pvt. Ltd. and Others vs. Appropriate Authority, PNDT Act and others in a Writ Petition filed by M/S Malpani Infertility Clinic Pvt. Ltd. in the High Court of Bombay, the order passed by Appropriate Authority suspending the registration of Petitioner's Diagnostic Centre under the PNDT Act was challenged. Main contention raised was that show cause notice, as contemplated u/s 20(1), an opportunity of hearing as contemplated u/s 20(2) and sufficient reasons as required u/s 20(3) of the Act were not given to petitioners before taking the action of suspending registration; hence the order was bad as per law. However, considering peculiar facts of the case, High Court rejected this contention. It was held that, as appropriate Authority has, after referring to that criminal prosecution issued the order of suspension, there was sufficient notice to petitioners and there was also sufficient mention of the reasons by the Appropriate Authority in suspension order. It was further held that, "when the reasons are required to be given in writing it is not necessary that there ought to be a detailed discussion." In the words of High Court, "where there is a conflict of private interest, to carry on a particular activity which the Public Authority considered as damaging to the social interest, surely the power under the Statute has to be read as an enabling power".

REAL SCENARIO

The girl child after she is born becomes a victim of gross nutritional and health neglect. Consequently, more female children than male children succumb to childhood illness and these impact the child sex ratio directly. According to the statistics of National Crime Record Bureau (NCRB) ,

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number of total registered cases of infanticide in Indian States was 134 in 2007 and the number became 74 in 2012[Table 1]. The number of infanticides was reduced in 2012 in comparison with 2007. This is really very encouraging. Again, the number of foeticide in Indian States was 92 in 2007. This number was increased to 207 in 2012. Within a gap of 5 years the number was increased to more than double, which is really alarming. However, the real number perhaps is more than what is reflected in the statistics. Because, all cases of infanticides and foeticides are not reported properly due to various reasons. Arunachal Pradesh, Assam, Goa, Himachal Pradesh, Jammu and Kashmir, Jharkhand, Manipur, Meghalaya, Mizoram, Nagaland, Orissa, Uttarkhand did not report a single case of infanticide and foeticide in 2012. Highest number of foeticide took place in Madhya Pradesh in 2012 among all Indian States followed by Rajasthan, Haryana and Punjab [Table No. 1].

Cases Registered against children for Infanticide and foeticide in 2007 and in 2012 in India

States	2007		2012	
	Infanticide	Foeticide	Infanticide	Foeticide
Andhra Pradesh	1	0	8	1
Arunachal Pradesh	0	0	0	0
Assam	0	0	0	0
Bihar	1	0	1	1
Chhattisgarh	8	10	8	5
Goa	1	0	0	0
Gujrat	7	1	0	7
Haryana	1	4	0	28
Himachal Pradesh	0	1	0	0
Jammu and Kashmir	0	0	0	0
Jharkhand	1	0	0	0
Karnataka	3	7	3	3
Kerala	1	0	0	1
Madhya Pradesh	29	10	17	64
Maharashtra	2	1	11	22
Manipur	0	0	0	0
Meghalaya	0	0	0	0
Mizoram	0	0	0	0
Nagaland	1	0	0	0
Orissa	0	5	0	0
Punjab	3	35	6	25
Rajasthan	1	16	3	37
Sikkim	0	0	1	2
Tamil Nadu	10	0	1	0
Tripura	0	0	0	0
Uttar Pradesh	61	1	14	11
Uttarakhand	0	0	0	0
West Bengal	3	1	1	0
TOTAL	**134**	**92**	**74**	**207**

Table No.-1

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According to a recent survey, in many of India's least developed states, girls are disappearing not so much from feticide as from infanticide or just plain neglect of the girl child leading to more number of girls dying . This is revealed in latest Annual Health Survey data of the census office, which shows a substantial fall in the sex ratio in the 0-4 years age group in several districts spread across nine states .In fact, in four of the nine States, it is not just specific districts but the entire state that has seen a worsening of the 0-4 sex ratio. The Census Office conducted an annual health survey in nine states, Uttar Pradesh, Bihar, Rajasthan, Madhya Pradesh, Odisha, Jharkhand, Chattisgarh, Uttarakhand and Assam.A baseline survey conducted in 2007-2009 had been followed up by similar ones in 2010 and 2011. Jharkhand, which had a relatively better sex ratio to begin with, and Rajasthan, which figured at the bottom of the pile, have shown the greatest improvement in both sex ratio at ibrth(SRB) and the 0-4 sex ratio. States that started off with high sex ratio in both categories, such as Chhatisgarh and Assam, had recorded the biggest decline in 0-4 sex ratios along with Bihar and Odisha . In Uttar Pradesh, 30 percent of the districts recorded a fall in the 0-4 sex ratio. In chattisgarh, the ratio fell in 13 out of 16 districts .

Sl. No.	State(no. of districts)	Sex Ratio at birth	Sex Ratio (0-4 Years)
1	Chattisgarh(16)	6	13
2	Assam(23)	3	18
3	Odisha(30)	14	21
4	Bihar(37)	7	22
5	Madhya Pradesh(45)	20	18
6	Uttar Pradesh(70)	22	22
7	Uttarakhand(13)	5	2
8	Jharkhand(18)	2	5
9	Rajasthan(32)	5	6

Table No.- 2

According to UNICEF, in 1991, the child sex ratio was 947 girls to 1000 boys and ten years later it had fallen to 927 girls to 1000 boys. A decline of 20 girls among 1000 boys within 10 years has raised great concern for everyone .Since 1991, 80 percent of districts in India have recorded a declining sex ratio with the State of Punjab being the worst. According to a study in 2009 by the global anti-poverty agency, Action Aid and the International Development Research Centre, the gender gap in some parts of the Punjab had increased to even 300 girls per 1000 boys .States like Maharashtra, Gujarat, Punjab, Himachal Pradesh and Haryana have recorded a more than 50 point decline in the child sex ratio in this period . According to 2006 UNICEF study, in India, 7000 girls a day are aborted only because they are girls . Another study in a Mumbai hospital found that 96 percent of female babies were

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aborted compared to only a small percentage of male babies .

According to Kamaljeet Gill, Professor of Economics at Punjabi University, "even today, birth of a girl child is viewed as a bad investment for future.....The reform needs to begin with the prosperous, educated class which abort a female child due to their narrow patriarchal view, where sons are considered to be the only hope of old age and even after life. " *Harshinder Kaur, a paediatric doctor, shared her first time experience of discrimination against female infants in Punjab's rural side as "she (girl child) was thrown in the garbage dump outside the village for dogs that ate her. Her only fault — she was the fourth girl born in a poor family*," .

According to Puneet Bedi, a Delhi-based obstetrician and gender-rights activist, "Indian authorities are not serious about curbing the practice of killing female children and foetuses. It is illegal in India for a doctor to tell parents the gender of their unborn child, or to abort it on the grounds of sex. But rarely do we see one getting prosecuted for this crime" . According to Dr. Bedi "Foeticide was invented, touted, touted and sold by the medical profession, and it operates with the complete consent of all factors of our society. So, you can kill a daughter and get away with this crime. As per Dr. Bedi, any effort to educate the parents of the value of a girl child would not be any help at this point. Because, we do not have time to play around with these chocolates and ice-cream solutions. We have to do something more serious. All agencies must immediately join hands and launch a stricter crackdown so that no medical professional in this murderous practice can escape. There's genocide on" . Female infanticide and selective abortion are committed in societies where it is believed that having a girl child is culturally and economically less advantageous than having a boy child. The girl Childs are killed through different means e.g. by lacing their feed with pesticides, forcing grains of poppy seed or rice husk down their throats, starving them to death, stuffing their mouths with black salt or urea, suffocating them with a wet towel or bag of sand, rubbing poison on the mother's breast, so that the baby girl is poisoned as she nurses, leaving the baby to die in the fields, burying the child alive etc . According to an estimate , one out of every three girls does not live to see her 15th birthday, one third of these deaths take place at birth, every sixth girl child's death is due to gender discrimination, one out of six girls does not live to see their 12th birth day. In most cases, daughters are denied their right to education, since expenses on their education is not considered to be an investment of higher returns. Girls are breastfed for a shorter period of time, which denies their right to adequate health and nutrition . Girls are also not immunized which led to their poor health and sickness. In fact, all these are deliberate attempt to reduce their lives.

Very recently it is reported that portable Chinese mini-ultrasound machines are sold in the Indian market and being used for illegal pre-natal sex-determination tests. As a result, government efforts against female foeticide appear to have suffered a blow. Lately, Haryana's food and drug administration (FDA) has already seized 42 such portable ultra-sound machines this month which were being used illegally for pre-natal sex determination tests and that too without due regis-

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tration with the authorities .According to FDA Commissioner, Dr. Rakesh Gupta, these portable Chinese ultrasound machines remain unregistered and hence no one can keep track of them or the tests conducted through them . These are being sold by their importers at a low price of Rs. one to two lakhs against the cost of Rs. 25 to 40 lakhs for the conventional ultra sound machines .Sale of these portable ultra sound machines illegally to India has posed a serious threat to our country and if it is not checked it may vitiate the very intention and purpose of our Pre-Conception and Pre-Natal Diagnostic Techniques (PCPNDT) Act. Not only that today, one can send a blood sample to clinics abroad with the help of the internet and a credit card- no need for ultra sound machine. In internet there are several advertisements which offer result of sex determination in lieu of money. A drop of blood from the expectant mothers can reveal foetal gender after seven weeks of pregnancy. Some advertisements also give guarantee of 95 percent accuracy or a complete refund of the money spent. This has more aggravated the situation seriously and which is perhaps beyond the control of present legislative set up.

Reasons behind female feticides and infanticides

There are various reasons behind female feticide and infanticide. Family lineage and family name are carried on by male children in many societies. Sons ensure the continuation of the family and women are considered as 'temporary guests' in the family of their father and mother. It leads to the parent to be concerned for their future generations and their son preference are increased. They possibly murder or abort girl children in order to get a son. However, preference for son is not at all only reason for female feticide and infanticide. There are many other reasons which are connected to each other. Many social practices are there which led to the low estimation of women in the society. Dowry demands, other costs of marriage of girls, difficulties involved in bringing up a girl child, social superstition/prejudice, want of proper education facilities and less job opportunities for women, absence of proper property rights of women after their marriage and easy availability of ultra sound and abortion services by various private clinics are few connected reasons. All these reasons have added to the apathy towards girl child in India. If we want to eradicate these social evils, we have to look at to these root causes. It is seen in village areas that parent become bankrupt for payment of dowry in their daughters marriage. Dowry payment includes cash, gold, silver and expensive consumer goods like TV, refrigerator, washing machine, motorbike, car, and what not. Some consider that the birth of a daughter is double loss. The daughter will cost money to bring up and the dowry and wedding ceremony also will drain money of the family. Moreover, after marriage, daughter will leave the father's family for husband's family. Sons will bring wealth into the family through dowry, whereas daughters mean expenditure and wealth depletion in the family. Parent thinks that there is no security in their old age if they do not have son.

Family planning has become another rea-

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son for female feticide and infanticide. Today, most of the people want small family with one or two children. As the number of children is very less, so, they expect to have at least one male child. This also prompts female feticide in some cases. Again, unwanted daughters also ran the risk of severe ill treatment at their homes causing them emotional and mental trauma. Their mothers are also tortured, harassed, beaten up, and even in many cases killed by the husband, in-laws and other family members of the husband. Their only offence is that they have given birth to girl child. Status of women in the society is increased when they give birth to male child. On the other hand, their status is reduced in the society when they give birth to girl child. Sometimes, mothers are pressurized and compelled to kill their daughters because girls are an economic burden to the family. Mothers, generally, do these under immense pressure, coercion and fear.

Unequal and meager remuneration for women in various works is another reason for apathy towards girl child. For the same work females are paid less remuneration. Generally, women enter in the domestic non-paid services which a patriarchal society gives little or no value at all, hence they are considered as liability rather than assets.

Marginalization of women in agriculture is another reason for increased apathy towards women. In many parts of our country, women used to work in the agricultural field. But, at present, modernization of agriculture and immergence of advanced technologies in the agricultural field have reduced the importance of women in the same field. This marginalization of women in Indian agriculture has led to increase in violence against women.

Misuse of technology and the illegal tests like Amniocentesis and ultrasonography have also aggravated the situation of female feticide in India. Failure to implement PNDT Act in some parts of the country has also added fuel to the flame to this problem.

CONCLUDING REMARKS AND SUGGESTIONS

According to Rashmi Singh, Director, National Mission for Empowerment of Women, MWCD, sex selective abortions were earlier considered an urban phenomenon. However, with easy access to technology these days the problem has become much more widespread and we are witnessing skewed sex ratio even in rural areas. It is unfortunate that in this case, the technology is not being used for the betterment of the society, but for destroying the foetus in a woman's womb. This skewed sex ratio is in turn leading to increased violence against women in the society .

Female feticide and infanticide are not any isolated social evils in the society. Many connected reasons are responsible for this. First of all, dowry system should be controlled and stopped in our society which is directly connected to these evil practices. For, Dowry Prohibition Act, 1961 should be properly implemented and stringent provisions should be incorporated in the existing Act to stop this practice. The Hindu utopian idea and belief that – a man cannot attain redemption unless a

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son/male child lights the funeral pyre has no scientific and legal basis. Does this mean that people from Muslim, Christian and other religion of the world will never attain redemption because they do not have such rule? A law should be enacted to prevent this social evil practice like prevention of 'sati'. This superstition has become one of the important causes among Hindus for son preference and female feticide. Girls should have equal right to light the pyre of parent. What Manu told is no more valid in the present era in order to keep pace with the changing society. Law should always respond to the need of the society and should be changed.

In order to give equal property right Hindu Succession Act 1956 should be amended further and daughters should be given equal property rights along with son from their birth and even after their marriage. In that case they will not be depended upon anybody else for their survival and they will raise their voice against injustice without fear.

Illegal doctors (including quack doctors in rural villages) and pre-natal clinics, which are offering sex-determination and sex-selective abortions should be strictly prohibited and banned. This offence should be considered as heinous crime and Indian Penal Code should be amended to consider this offence as murder and stringent punishment should be given to persons who will be involved in this crime.

Government, NGO, and other Social Organization should take steps to enhance mass awareness regarding ill effect of female feticide and infanticide. Government should come forward to extend financial help to girl children of the poor family for their education and marriage. A sense of security for girl child should be created in the society. Young married couples and pregnant women should be counselled so that they can protect girl child from the supporters of female feticide and infanticide. Each and every case of pregnancy should be compulsorily registered either before police station or before chief medical officer and a report should be placed periodically to the higher authority. In village areas, village Chowkidar, Sarpanch, or Panchayet can be engaged for this purpose.

Electronic, Print and other Social media have an important role to play here. Cases of infanticide and feticide should be reported properly by the media. Media can also play an important role to raise mass awareness about evil effects of these crimes.

Government should also take extensive steps to expand female education in almost all levels of our society. More attention should be given to the rural village areas. Only proper education of women can check this problem to some extent. However, though government has taken various steps like adoption of 'Balika Samriddhi Yojana' in 1997, enactment of different laws, 'Survival, Protection and Development of the Girl Children' project etc- these are not sufficient. More bold steps are to be taken by the government in this direction.

In fine, I must say that law has an important role to play here to eradicate these evil practices but above all awareness of the common people should be raised. Women should come forward boldly to

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protest against any kind of threat, pressure and torture. Unless our mind set up is changed regarding various social and religious fanaticisms about the girls, these evil practices cannot be prevented. And ultimately I must put my inmost appeal to everyone to do something in this regard for the prevention of these evils. Because, 'charity should begin at home'.

REFERENCES

1. The Times of India, 10th October, 2013, Patna edn.
2. "Man wipes out his family as wife didn't deliver son".- Times of India, 28-05-2014, Patna edn.
3. Female foeticide and Infanticide in India: An Analysis of crimes against Girl Children- SnehlataTandon and Renu Sharma, *International Journal of Criminal Justice Sciences,* Vol.1, Issue 1, January 2006.
4. "Female foeticide on the rise among wealthy, educated", The Times of India, 25th May, 2011, Kolkata edn.
5. "India's gender gap among worst", The Times of India, October,27, 2013,Patna Edn.
6. Dr (Mrs) Mamta Rao, Law Relating to women and Children, Eastern Book Company; Lucknow, edn. 2008, P-141.
7. Preamble to the Pre-Conception and Pre-Natal Diagnostic Techniqu(Prohibition of sex selection) Act 1994.
8. Section 3(1) of the Pre-Conception and Pre-Natal Diagnostic Techniqu(Prohibition of sex selection) Act 1994.
9. Section 3(2) of the Pre-Conception and Pre-Natal Diagnostic Techniqu(Prohibition of sex selection) Act 1994.
10. Section 3(3) of the Pre-Conception and Pre-Natal Diagnostic Techniqu(Prohibition of sex selection) Act 1994.
11. Section 3A of the Pre-Conception and Pre-Natal Diagnostic Techniqu(Prohibition of sex selection) Act 1994.
12. Section 3B of the Pre-Conception and Pre-Natal Diagnostic Techniqu(Prohibition of sex selection) Act 1994.
13. Section 6 of the Pre-Conception and Pre-Natal Diagnostic Techniqu(Prohibition of sex selection) Act 1994.
14. Chapter VI, Section 18(1) of the Pre-Conception and Pre-Natal Diagnostic Techniqu(Prohibition of sex selection) Act 1994.
15. Section 22(1) of the Pre-Conception and Pre-Natal Diagnostic Techniqu(Prohibition of sex selection) Act 1994.
16. Section 22(2) of the Pre-Conception and Pre-Natal Diagnostic Techniqu(Prohibition of sex selection) Act 1994
17. Section 23(1) of the Pre-Conception and Pre-Natal Diagnostic Techniqu(Prohibition of sex selection) Act 1994.
18. Section 23(2) of the Pre-Conception and Pre-Natal Diagnostic Techniqu(Prohibition of sex selection) Act 1994.
19. (2001)5 SCC 577; AIR2001 SC 3007.
20. (2003)8 SCC 406.
21. (2003) 8 Supreme Court Cases 398
22. AIR 2008 Ori HC 71.
23. 2005Cr.L.J.3408;MANU/MH/0293/2005.

ISSN : 2393 - 9338

24. 2011 Cri.L.J.876; MANU/PH/0449/2010.

25. AIR 2005 Bom.26

26. *http://www.ncrb.nic.in[Accessed in 28-05-2014].*

27. *http://www.ncrb.nic.in[Accessed on 28-05-2014].*

28. Ibid.

29. *http://www.censusindia.gov.in/2011-common/AHSurvey.html…(Accessed on 25-05-2014).*

30. Ibid(supra).

31. Ibid.

32. Ibid.

33. Ibid.

34. *http//www.oneyoungworld.com/Sites/www.oneyoungworld.Com/themes/Com/themes/custom/oneyoungworld/pdf/Essay4.pdf(Accessed on 09-05-2014).*

35. *http//www.unicef.org/india/media_3285.htm. (Accessed on28-05-2014).*

36. "An Overview of Gendercide and Daughter Abuse in India"- Society for the Protection of the Girl Child, *http://www.protectgirls.org/uploads/Society_for_the_protection_of_the_Girl_child_situation_Overview2.pdf(Accessed on 8-5-2014).*

37. Ibid 19 (supra)..

38. "An Overview of Gendercide and Daughter Abuse in India"- Society for the Protection of the Girl Child, *http://www.protectgirls.org/uploads/Society_for_the_protection_of_the_Girl_child_situation_Overview2.pdf(Accessed on 8-5-2014).*

39. Ibid.

40. "Female infanticide affects sex ratio in Punjab". The Hindu, April 16, 2010,

41. *www.thehindu.com/.../female-infanticide-affects-sex-ratio-in-Punjab/article398285....(Accessed on 31-05-2014).*

42. Ibid.

43. "Female foeticide continues inIndia as new law falters," The National, May 20, 2010, *www.thenational.ae/news/world/southasia/female-foeticide-continues-in-India-as-new-law-falters...(Accessed on 30-05-2014).*

44. Ibid.

45. "An Overview of Gendercide and Daughter Abuse in India"- Society for the Protection of the Girl Child, *http://www.protectgirls.org/uploads/Society_for_the_protection_of_the_Girl_child_situation_Overview2.pdf. (Accessed on 8-5-2014).*

46. B.R. Siwal,- "Preventive Measures for elimination of female foeticide", *http://www.eldis.org/fulltext/PREVENTIVE_MEASURES_FOR_FEMALE_FOETICIDE.pdf.(Accessed on 08-05-2014).*

47. Devaki Monani Ghansham, "Female foeticide and the dowry system in India". *http://www.adfvc.unsw.edu.au/Conference%20papers/TIWC/GhanshamDevakiMonani.pdf(Accessed on 08-05-2014).*

48. Ibid.

49. 'Portable ultrasound machines used for sex-determination tests'- The Times of India, 27-02-2014, Patna edn.

50. Ibid.

51. Ibid.

52. 'Female foeticide still rampant', The Times of India, 20-12-2013, Patna edn.

N. J. Comp. Law Vol. 2 (1) 2015, pp. 34-41

ISSN : 2393 - 9338

DISASTER MANAGEMENT IN INDIA: ROLE OF LAW AND APPLICABILITY

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(Date of Receipt :16-07-2014; Date of Acceptance for Publication : 02-01-2015)

Abstract

Disaster is an occurrence arising with little or no warning, which causes or threatens serious disruption of life and perhaps death or injury to large number of people, and requires therefore a mobilization of efforts in excess of that normally provided by the statutory emergency services. Like any other crisis whenever disaster occurs law is present to safeguard from unusual situations. India is among those countries of the world which are very prone to disasters and people are vulnerable to mishappenings. Law is an instrument which can play a very important role to provide some relief to those people who suffer in such a mishappening situation. Laws relating to disaster management in India are not codified due to which it becomes difficult to approach appropriate authorities and agencies for getting relief from effects of disaster. This paper is an attempt to trace laws relating to disaster management in India. Through this paper various roles played by the law in disaster management will be discussed.

Key Words : Disaster management, Pre_disaster Role,law for managing a disaster.

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INTRODUCTION

Disaster is unlike anything else in human experience. A disaster is widely perceived as an event that is beyond human control, the capricious hand of fate moves against communities creating massive destruction and prompting victims to call for divine support as well as earthly assistance. It strikes quickly – it changes the lives of all it touches and its effects are felt long after the event. "*A disaster is a serious disruption of the functioning of society causing widespread human, material or environmental losses which exceeds the ability of affected society to cope on its own resources.*" [1]

The Indian subcontinent is among the world's most disaster prone areas. With its vast territory, large population and unique geo climatic conditions, Indian sub continent is exposed to natural catastrophes traditionally. Even today the natural hazards like floods, cyclones, droughts, and earthquakes are not rare or unusual phenomenon in the country. Among 35 States/Union Territories, 25 are disaster

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prone. While average loss of life is 3600, 1.42 million hectare crop area is affected and 2.36 million houses are damaged annually.[2] Though in many cases, the loss goes unnoticed from the general public but, the figures are quite concerning. In India, while 40 million hectares of landmass is prone to floods, 68% of the total areas, are vulnerable to periodical droughts.

At the global level, there has been considerable concern over natural disasters. Even as substantial scientific and material progress is made, the loss of lives and property due to disasters has not decreased. In fact, the human toll and economic losses have mounted. It was in this background that the United Nations General Assembly, in 1989, declared the decade 1990-2000 as the International Decade for Natural Disaster Reduction with the objective to reduce loss of lives and property and restrict socio-economic damage through concerted international action, especially in developing countries[3].

ROLE OF LAW AND APPLICABILITY

Disaster, as we know is an unwanted happening occurred due to natural causes or some manmade reasons. But no doubt, all the time any kind of disaster brings havoc, irregularities, mismanagement on a large scale and the situation worsens when it becomes out of control from the hands of administration trying for disaster management. Here at this point, need for the involvement of law is felt to manage the situation arising out of disasters.

Law plays a fourfold role in disaster management:

- **Pre- disaster (Preventive)**
- **During disaster (Administrative)**
- **Post- disaster (Reactive)**
- **Institutional**

Through this role played by law for managing a disaster it becomes effective for the authorities to cover all the areas and helps needed by the affected people without any discrimination and according to their needs.

Pre – disaster Role (Preventive)

In its pre-disaster role, the main objective of the law is its endeavors for the risk reduction. We all know that, natural disasters cannot be controlled by any human activity. So what law can prevent effectively are the manmade disasters and hazards that could come out of these. As it cannot control natural disasters but by, its provisions it can minimize the vulnerabilities and help in capacity building. It also lays down standards for the characterization of disasters, which will be helpful in determining the nature of help and assistance to be provided to the victims. There are laws in India, which deals with the safe and proper handling of the chemical wastes and hazardous substances so that, the Industrial and chemical disasters can be controlled.

The term 'hazardous substance' finds its meaning in The Environment (Protection) Act, 1986. Section 2(e) of the Act states that:

"*Hazardous substance means any substance or preparation which, by reason of its chemical or physic-chemical properties or handling, is liable to cause harm to human beings, other living creatures, plants, micro-organisms, property or the environment*"

Section 8 of the Act provides that:

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"*No person shall handle or cause to be handled any hazardous substance except in accordance with such procedure and after complying with such safeguards as may be prescribed*".

According to **Section 2(d)** of the Act provides that:

Handling, '*in relation to any substance, means the manufacture, processing, treatment, package, storage, transportation etc, use, collection, destruction, conversion, offering for sale, transfer or the like of such substances*'.

The Hazardous Waste (Management and Handling) Rules 1989 was enacted by the Central Government for proper handling of hazardous wastes to control any kind of industrial and chemical disaster. Rule 4 of the Hazardous Waste Rules 1989 deals with the responsibility of the occupier and the operator of facility for handling of wastes. It provides that the occupier generating hazardous wastes in quantities equal to or exceeding the limits specified in the schedule shall take all practical steps to ensure that such wastes are properly handled and disposed of without any adverse effects which may result from such wastes and the occupier shall also be responsible for the proper collection, reception, treatment, storage and disposal of these wastes either himself or through the operator of a facility. [4]

The Bio-Medical Waste Management and Handling Rules, 1998 was enacted for the proper handling, storage, collection, treatment and disposal of the biomedical wastes, so that there shall be no pollution and any kind of disaster because of these wastes.[5]

The Factories Act, 1948[6] in, Section 12 also prescribes for the proper disposal of wastes and effluents, it provides that;

'*Effective arrangements shall be made in every factory for the treatment of wastes and effluents due to the manufacturing process carried on therein, so as to render them innocuous and for their disposal*'.

The basic idea behind this is that, nobody knows how the disaster is going to strike, but from our experiences and ingenuity it can certainly be contemplated what things necessarily invite disaster sooner or later. Law prohibits such things thereby pre-empts occurrence or recurrence of certain disasters.

During Disaster (Administrative)

When the disaster strikes, either natural or manmade a situation of chaos, confusion, agony, scarcity occurs and it becomes very difficult to handle the situation for administration. At that time the law endeavors to continue/ensure the rule of law in such situations.

The Disaster Management Act, 2005,[7] has been enacted by the government of India to handle the situations during the disasters. Under the Act a National Disaster Response Force for the purpose of specialist response to a threatening disaster situation or disaster is to be continued. The general superintendence, direction and control of the Force shall be vested and exercised by the National Disaster Management Authority and the command and supervision of the Force shall vest in an officer to be appointed by the Central Government as the Director General of the National Disaster Response Force.

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The Act imposes punishment to persons for contravening the provisions of this Act, 2005 such as obstructing or abandoning, refusing to comply with any of the provisions of the Act, making false claims, misappropriation of money or materials or false warning etc.

The National Authority , the State Authority , or a District Authority is empowered to recommend Government to give direction to any authority or person in control of any radio or audiovisual media or such other means of communication as may be available to carry any warning or advisories regarding any threatening disaster situation or disaster, and the said means of communication and media is designated shall comply with such direction.

Post-Disaster (Reactive)

After the occurrence of disaster, the situation becomes worse because, due to the devastations caused by the disaster the poor and helpless who are the worst affected becomes more vulnerable. For rich and other persons having approach, access to the medical, insurance, financial support is an easy thing but not for all. Due to this attitude of a section of society it becomes difficult to provide help and assistance to the needy person. In this situation, law lays measures for relief and rehabilitation for those affected from the disaster. It also strives to compensate the losses to the extent possible by measures like insurance, ex-gratia and awards.

Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 , was enacted after the Bhopal Gas Leak Disaster involving the release on 2nd and 3rd December, 1984, of highly and abnormally dangerous gas from a plant of Union Carbide (India) Limited, a subsidiary of the Union Carbide Corporation, USA. More than 2000 people were killed and many suffered from different kinds of health problems. Not only this, the effect of dangerous gas is still prevalent in the sufferers of the disaster. The Act was enacted for making claims by the victims and according to Section 3 of the Act; the Central Government have exclusive right to represent the claimants inside or outside the country. This Act enabled the victims to fight a legal battle against the Union Carbide to get claims with the help of law enacted in the country form saving them from any kind of sufferings.

Public Liability Insurance Act, 1991, has been enacted with the object of providing immediate relief to the victims of accidents that might occur while handling of hazardous substances. Under Section 3 of the Act, the owner who has control over handling of hazardous substance is required under the Act to pay specified amounts to the victims as interim relief based on 'no-fault' liability. Section 4 of the Act makes it mandatory for every owner handling hazardous substances to take out insurance policies. However, the Act could not be implemented on account of the insurance companies not agreeing to give insurance policies for unlimited liability of the owners. It was; therefore, felt that the liability of the insurance companies should be limited to the amount of insurance policy though the owner's liability should continue to be unlimited under the Act. The minimum and maximum limits of the insurance amount in an insurance policy also needed to be specified for ensuring payment of adequate relief. Accordingly, The Public Liability Insurance

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(Amendment) Ordinance was promulgated by the President on 31st January 1992, as the owners handling hazardous substances had to take insurance policy by March 1, 1992.

INSTITUTIONAL ROLE OF LAW

Law creates institutions and authorities at various levels of governance to enforce the mandate of law in pre, post and situations of disasters. These institutional frameworks work for the proper implementations of present legal facilities for the better governance of the situations arising out of disasters.

The National Environment Tribunal Act, 1995 has been enacted in view of the phenomenal increase in the cases of accidents occurring in the industries handling hazardous substances. The preamble of the Act refers to some of the decisions taken at the UN Conference on Environment and Development held at Rio de Janeiro in June 1992, relating to the duties of the States to develop National Laws regarding liability and compensation for the victims of pollution and other environmental damages. Accordingly, the Act has been enacted with an object to provide for strict liability for damages arising out of any accident occurring while handling hazardous substances and for the establishment of a National Environmental Tribunal for effective and expeditious disposal of cases arising from such accidents with a view to giving relief and compensation for damages to persons, property and environment and for matters connected therewith or incidental thereto. The Green Tribunal Act, 2010 is an Act to provide for the establishment of a National Green Tribunal for the effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources including enforcement of any legal right relating to environment and giving relief and compensation for damages to persons and property and for matters connected therewith or incidental thereto. The Tribunal has Original Jurisdiction on matters of "substantial question relating to environment" (i.e. a community at large is affected, damage to public health at broader level) & "damage to environment due to specific activity" (such as pollution). However there is no specific method defined in Law for determining "substantial" damage to environment, property or public health. There is restricted access to an individual only if damage to environment is substantial. The powers of tribunal related to an award are equivalent to Civil court and tribunal may transmit any order/award to civil court have local jurisdiction. The Bill specifies that an application for dispute related to environment can be filled within six months only when first time dispute arose (provide tribunal can accept application after 60 days if it is satisfied that appellant was prevented by sufficient cause from filling the application). Also Tribunal is competent to hear cases for several acts such as Forest (Conservation) Act, Biological Diversity Act , Environment (Protection) Act , Water & Air (Prevention & control of Pollution) Acts etc. and also have appellate jurisdiction related to above acts after establishment of Tribunal within a period of 30 days of award or order received by aggrieved party.

The accidents arising out of radioactive substances are governed by the Atomic Energy Act 1962, the regulations of the

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Atomic Energy Regulatory Board and Radiation Protection Rules 1971 made by the Central Government under Atomic Energy Act, 1962.

The Disaster Management Act, 2005 also empowers the Central Government to constitute an institute to be called the National Institute of Disaster Management . The institute functions within the broad policies and guidelines laid down by the National Authority and is responsible for planning and promoting training and research in the area of disaster management, documentation and development of national level information base relating to disaster management policies, prevention mechanisms and mitigation measures.

GENERAL

The role of law in disaster management is as important as any other aspect like, medical, insurance and relief and rehabilitation. The legislation of the country has created strong and enabling environment and institutional framework for thorough disaster management.

Our Constitution also prescribes a duty under Article 51A (g) , it shall be duty of every citizen of India:

'*to protect and improve the natural environment including forests, lakes, rivers and wild life and to have compassion for living creatures*'

Article 21 also says that:

'No person shall be deprived of his life or personal liberty except according to the procedure established by law'

By virtue of various cases decided by the Supreme Court in India giving wide interpretation to Article 21, now it has become possible to include matters related to environment and disaster management under the ambit of the Constitution. The life in Article 21 does not mean only mere animal existence but it is something more than that, it also included safety from any kind of effect of disaster. On this account the Disaster Management Act, 2005 has come into shape and it is now being implemented with a legal force for providing legal protection to the victims of various kinds of disasters.

CONCLUSION

When we see laws relating to disaster management in India, we find that they are quite scattered in various Act, only the Disaster Management Act, 2005 is specifically dedicated to the disaster management in India at various levels i.e. Central, State, District and Local level. Avery significant example of success of Disaster Management in India had been witnessed during the Orissa Cyclone (Phailin), fiercest storm in 14 years. Unlike Super Cyclone of 1999, which claimed 9,885 lives, the number of causalities has been reduced to only 21 . All this happened because of Disaster Management and preparedness by the State Govt. along with Central, State and District Disaster Management Authorities. Effective management of the very severe cyclone Phailin has earned praise from United Nations, "Odisha's handling of the very cyclone will be a landmark success story in disaster management".

The success story of management of cyclone in Odisha is the beginning in dis-

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aster management of natural disasters in India. It is impossible to control natural disasters but what we can do is to manage them and reduce the causalities. It is possible to control man-made disasters completely, need is to control them on time. But even if disaster occurs law is there to manage the situation and console the victims.

Though people are not well aware about disaster management laws due to lack of knowledge and education, the legal arrangement in India for managing and handling the disasters is quite strong for supporting the affected people. But the need of the day is proper implementation of these laws in combating disasters in our country.

REFERENCES

1. United Nations Department of Humanitarian Affairs, 2001
2. *http://www.ndmindia.nic.in accessed on 05/06/2014.*
3. *http://www.unisdr.org accessed on 06/06/2014.*
4. *www.mpcb.gov.in accessed on 06/06/2014.*
5. *www.norham.org accessed on 06/06/2014.*
6. *www.plabour.gov.in accessed on 07/06/2014.*
7. This Act provides for the effective management of disasters and for matters connected therewith or incidental thereto.
8. Section 3(1)
9. Section 51- 60
10. Section 8
11. Section 14
12. Section 25
13. *www.chemicals.nic.in accessed on 09/06/2014.*
14. It is considered as the world's worst industrial disaster, occurred due to the leakage of methyl isocynate (MIC) Gas in Union Carbide India Limited in Bhopal. It claimed 3,787 deaths and 558,125 injuries.
15. *www.irda.gov.in accessed on 11/06/2014.*
16. *www.parliamentofindia.nic.inaccessed on 12/06/2014.*
17. Also known as The Earth Summit or the Rio Summit resulting into Agenda 21.
18. www.envfor.nic.in accessed on 10/06/2014.
19. Constituted under India's Constitutional Provision of Article 21, which assures the citizens of India the right to a healthy environment.
20. http://www.moef.nic.in, accessed on 10/06/2014.
21. www.en.wikipedia.org accessed on 11/06/2014.
22. Act of 1980.
23. Act of 2002.
24. Act of 1986.
25. Acts of 1974.

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26. www.cseindia.org accessed on 10/06/2014.

27. www.dae.nic.in accessed on 11/06/2014.

28. Originally Constituted under an Act of Parliament in 1995 with name, The National Centre of Disaster Management (NIDM) and was redesignated to give present name of National Institute of Disaster Management (NIDM) by the Disaster Management Act, 2005

29. Fundamental Duty *http://articles.economictimes.indiatimes.com accessed on 12/06/2014.*

30. Margareta Wahlstrom, Special Representative of the UN Secretary General (SRSG) for Disaster Risk Reduction.

N. J. Comp. Law Vol. 2 (1) 2015, pp. 42-53

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EMERGING CONTOURS OF HUMAN RIGHTS

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(Date of Receipt :07-07-2014; Date of Acceptance for Publication : 26-12-2014)

Abstract

Philosophically '**Human Rights**' are inalienable, naturally ordained rights of man. They got institutionalized by the UN Charter and firmly ensconced in '**Universal Declaration of Human Rights**'. Human rights, as originally envisaged, have undergone drastic change over the period of time with the change in socio-political-scientific-cultural outlook across the world. Originally, the category of human rights was a perceived to promote libertarianism and egalitarianism whereas the changing perception successfully advocated for inclusion of fraternity i.e. peace, development, environment etc., popularly known as '**third generation of human rights**'. At the same time human rights have kept pace with the changing dynamics of society and evolved further to include in its fold sexual rights, indigenous peoples' rights, transgenders' rights etc. making people to name those as 'fourth generation of human rights' whereas the author prefers to call them as 'contemporary human rights'.

Key Words : Human Rights, Universal Declaration of Human Rights (UDHR), Civil and Political Rights

Pages:12 References: 20

INTRODUCTION

Human rights are the very basic, inalienable and naturally ordained rights of man in virtue of being born as human being. They represent the fundamental claims of individual against the State/Society. Upon the solemn promise of protection of those fundamental claims only the

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modern nation-state as well as world order stands. Although clamours for human rights assertion was there but post Second World War scenario witnessed a new dawn in the history of human rights which brought on international stage the issue of human rights hitherto subject of state jurisdiction. Naturally ordained moral/ideal/abstract rights got codified as universal human rights. This gave individual rights not only against its state but also against foreign states. In other words human rights were internationalized with binding effect. The adoption of UN Charter recognized the central importance of fundamental human rights in the governance of the world. Emphasising the importance of human rights the Universal Declaration of Human Rights (UDHR) 1948 recognised that human rights constitute the foundation of freedom, justice and world peace.

In Article 55 the Charter declares: "...the United Nations shall promote: ... (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." In line with UN Charter the UDHR put the concept of fundamental human rights in firm footing and advanced a bundle of rights as human rights. It declared human rights as inalienable and termed as constituting the bedrock of freedom, justice and world order. The Declaration set a standard for achievement for nations as well as society and individuals. Rights enumerated in the declaration were given binding effect by two Covenants.

But with the change in time the conception of and outlook towards human rights has changed substantially adding more and more rights to its fold making it more flexible and expandable. Since beginning it is evolving constantly. This paper seeks to discuss its changing nature and emerging areas contributing to the human rights jurisprudence.

NATURE OF HUMAN RIGHTS

Human Rights are by nature inalienable. They are the natural rights of man conferred/endowed by God/Nature. French Declaration of the Rights of Man and Citizen 1789 designate them as natural and imprescriptible rights of man. Jacques Maritain pointed out: "[The] human person possess[es] rights because of the very fact that it is a person, a whole, a master of itself and of its acts ... by virtue of natural law, the human person has the right to be respected, is the subject of rights, possesses rights. These are things which are owed to a man because of the very fact that he is a man."

This concept has squarely adopted by the international community. "The United Nations' concept of human rights embraces this natural law concept of rights, rights to which all human beings have been entitled since time immemorial and to which they will continue to be entitled as long as humanity survives."

The Universal Declaration of Human Rights 1948, International Covenant on Civil and Political Rights 1966 (ICCPR), International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR) and other human rights document expressly declare human rights as inalienable in nature. The UDHR in its preamble asserts that "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world." The same idea has been adopted by the two covenants

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i.e. ICCPR and ICESCR and adopted/designated a variety of rights as human rights. Although these documents along with others recognized human rights as inalienable and universal but all listed rights don't qualify for inalienability and universality. The covenants allow member states to derogate or limit the rights enumerated therein under certain situations/conditions making them alienable.

2.2 On a closer look at ICCPR it can be found that it classifies human rights into four categories which are as follows:

1. Derogable [Article 4 (1)]
2. Non-derogable [Article 4 (2), Arts. 6, 7, 8 (1)-(2), 11, 15, 16, 18]
3. Limitable in times of emergency [Articles 8 (3), 9 (1), 10 (1), 17, 14 (3)]
4. Limitable to protect national security, public order etc.[Articles 12, 14, 18(3), 19 (3), 21, 22)

Article 4 of the covenant states: "1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision."

2.3 As regards rights enumerated in ICESCR, all rights are limited rights. In Article 4 it states, "... the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society." However Article 8 (1) put restriction on right in relation to formation of trade union. It says, "... No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;"

2.4 The sanctity of natural rights as human rights have been maintained but in a modified form as in a civil state/society it is quite impracticable to maintain absolute natural rights. So, by positive law the essential and basic elements of human rights or, without which existence of humanity would be impossible, have been kept intact. Such rights have been kept away from the reaches and clutches of state and other authorities. "Some scholars may find these differentiations petty. Nevertheless, they show the marriage of positivist and natural law doctrines, the positive law helping to enforce natural law distinctions."

CHANGING DIMENSIONS OF HUMAN RIGHTS

Much time has elapsed since adoption of UDHR and a lot of change has taken place in the horizon of human rights. In between the world has witnessed monumental changes and shift in focus in almost all fields i.e. political, social, ideological, cultural, economic, technological and scientific contributing to greater understanding of concept of human rights and its implementation and also its demand and assertion. Although considerable distance has been covered witnessing many

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changes, ups and downs, paradigm shifts still the concept of human rights has not been permanently and finally defined making it amenable to more and more interpretation and expansion. Indeed the ambit and reach of human rights has grown multi-fold and still it is evolving reflecting the changing dynamics of world society at large.

"Human rights are, however, the result of an unfinished process under permanent transformation. New commitments, needs and rights are emerging, but above all an awareness is arising in the present societies, which make visible peoples and social groups who appear today with a voice through the emergence of an organised international civil society."

Law and concept of rights have to respond to changing dynamics of the society and adept to it in a timely manner. The onset of 21st century has unfolded multiple issues and challenges in the face of the society demanding/clamouring for action in the perspective of human rights. "New social, economic and political actors that are appearing or becoming visible in the 21st century are also arising today in the face of new contexts and of the globalisation of the economy, major transformations of science and technology, medical engineering, phenomena such as world migrations and movements of large population nuclei, the increase of poverty at world level and of extreme poverty in the Third World, the appearance of new forms of slavery, intensification of terrorism and narcotics trafficking, subsistence and intensification of interethnic conflicts and of the political hegemony of one country with respect to political blocs under formation in the present-day geopolitical configurations, among other great challenges that the world is now facing."

First and Second Generations of Human Rights

In the face of the above we can see a change of perception regarding the concept of human rights. Rather all such changes are being accommodated with in the fold of human rights by political as well as legal actions since its dawn. Originally the concept of human rights pertains to the individual and its interests only since the day of assertion/recognition of natural rights as human rights. They have so developed since the days of Magna Carta 1215 through Petition of Rights 1627, Bill of Rights 1639, French Declaration of the Rights of Man and American Bill of Rights. But with the change in time it took the colour of group/collective rights. The Russian Revolution of 1917 brought to fore the concept of economic and social rights and later the establishment of International Labour Organisation (ILO) added to it. On the basis of this the human rights are treated as two generations of rights 'first generation' being the 'civil and political rights' and 'second generation' the 'economic, social and cultural rights'. But while asserting the rights against the tyranny before and during the Second World War the leaders saw no such distinction between rights.

President Roosevelt in 1941 asserted: "In the future days, which we seek to make secure, we look forward to a world founded upon four essential human freedoms. The first is freedom of speech and expression–everywhere in the world.

The second is freedom of every person to worship God in his own way–everywhere in the world.

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The third is freedom from want–which, translated into world terms, means economic understandings which will secure to every nation a healthy peacetime life for its inhabitants– everywhere in the world.
The fourth is freedom from fear–which, translated into world terms, means a world-wide reduction of armaments to such a point and in such a thorough fashion that no nation will be in a position to commit an act of physical aggression against any neighbor– anywhere in the world."

Later in 1944 Roosevelt more elaborately outlined the importance of economic and social rights and declared: "...true individual freedom cannot exist without economic security and independence."

He further declared: "In our day these economic truths have become accepted as self-evident. We have accepted, so to speak, a second Bill of Rights under which a new basis of security and prosperity can be established for all regardless of station, race, or creed." With this declaration he brought within its fold right to home, food, education, health etc. changing the discourse on division or kinds or generations of human rights. This reality is reflected in the International Bill of Rights i.e. UDHR and the covenants and protocols.

Third Generation of Human Rights

Growth of human rights have not been limited to those categories as discussed above rather it has gone beyond that and still growing. With the change in world order the needs and expectations of the world changed commensurately and led to the growth of new categories of human rights known as 'third generation of human rights or solidarity rights'. Karel Vasak of UNESCO popularized the phrase 'third generation of human rights. "Vasak also has pointed out that the first two generations of human rights were designed to achieve the first two of the three guiding principles of the French Revolution-liberte and igalite-while the third generation is predicated on brotherhood--fratenite. According to Vasak, the new rights, even more than the rights belonging to the first two categories, are based on the sense of solidarity, without which the chief concerns of the world community, such as peace, development and environment, cannot be realized." He wished to infuse human dimension to an area which was exclusively left to State(s) and which can be realized only by the concerted efforts of all actors like Individual, Society, State, Public and private bodies and International Community. Such rights include the right to political, economic, social and cultural self-determination, right to development, the right to a healthy and ecologically balanced environment, the right to peace, and the right to ownership of the common heritage of mankind.

Regarding third grenération of human rights Sohn observed: "One of the main characteristics of humanity is that human beings are social creatures. Consequently, most individuals belong to various units, groups, and communities; they are simultaneously members of such units as a family, religious community, social club, trade union, professional association, racial group, people, nation, and state. It is not surprising, therefore, that international law not only recognizes inalienable rights of individuals, but also recognizes certain collective rights that are exercised jointly by individuals grouped into larger

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communities, including peoples and nations. These rights are still human rights; the effective exercise of collective rights is a precondition to the exercise of other rights, political or economic or both. If a community is not free, most of its members are also deprived of many important rights."

Other Third Generation Human Rights

Another group of third generation human rights was recognised in the Symposium on 'The Study of New Human Rights: The Rights of Solidarity' Mexico, 12-15 August 1980 under the aegis of UNESCO observed: "Many other aspects of human rights related to solidarity among human beings are often inadequately formulated. In any project concerning the "new rights", care should be taken to give more complete formulation to rights which are already recognized, For purposes of illustration, reference can be made to the right to international humanitarian assistance or the right of linguistic minorities to be brought up and given instruction in their mother tongues – at least at the primary level; this rule should also be applied to immigrant workers and their families in the host countries."

CONTEMPORARY HUMAN RIGHTS

This indicates that there is ample scope for the growth of human rights. Some people add another generation to it i.e. Fourth Generation of human rights in connection with trade and intellectual property related human rights under WTO. "As an absolute yardstick, human rights constitute the 'common language of humanity'. Adopting this language allows all peoples to understand others and to be the authors of their own history. Human rights, by definition, are the ultimate norm of all politics. As an historical synthesis, human rights are, in their essence, in constant movement..." So, human rights have to keep pace with changes of the society and constantly evolve. In tune with this, group of human rights have been truly growing in the contemporary scenario. Below certain rights are discussed which come within the purview of human rights which may be termed as contemporary human rights. The rights discussed below are not exhaustive and final rather they indicate the evolving nature of human rights.

Declaration of Sexual Rights 1999

The declaration was adopted in Hong Kong at the 14th World Congress of Sexology, August 26, 1999. It says' "Sexuality is an integral part of the personality of every human being. Its full development depends upon the satisfaction of basic human needs such as the desire for contact, intimacy, emotional expression, pleasure, tenderness and love. Sexuality is constructed through the interaction between the individual and social structures. Full development of sexuality is essential for individual, interpersonal, and societal well being. Sexual rights are universal human rights based on the inherent freedom, dignity, and equality of all human beings. Since health is a fundamental human right, so must sexual health be a basic human right." With this declaration it recognizes the right to sexual freedom, the right to sexual autonomy, sexual integrity, and safety of the sexual body, the right to sexual privacy, the right to sexual equity etc. as sexual rights.

Universal Declaration on the Human Genome and Human Rights 1997

It recognized, "that research on the hu-

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man genome and the resulting applications open up vast prospects for progress in improving the health of individuals and of humankind as a whole, but emphasizing that such research should fully respect human dignity, freedom and human rights, as well as the prohibition of all forms of discrimination based on genetic characteristics.." And delineated the right as: "Article 2 - **(a)** Everyone has a right to respect for their dignity and for their rights regardless of their genetic characteristics. **(b)** That dignity makes it imperative not to re duce individuals to their genetic characteristics and to respect their uniqueness and diversity." At the same time it defines certain rights like right to information, decision etc.

European Convention on Human Rights and Biomedicine 1997

The preamble of the Convention says, "The development of science over the years and its applicability to medicine and biology has the potential to take a dangerous turn. Science, with its new complexity and extensive ramifications, thus presents a dark side or a bright side according to how it is used..." and outlines the right of individual as: 'The individual needs to be shielded from any threat resulting from the improper use of scientific developments. For example, the prohibition of the use of all or part of the body for financial gain and restriction of the use of genetic testing...'

Universal Declaration on Bioethics and Human Rights 2005

The declaration observes: "... Reflecting on the rapid developments in science and technology, which increasingly affect our understanding of life and life itself, resulting in a strong demand for a global response to the ethical implications of such developments,

Recognizing that ethical issues raised by the rapid advances in science and their technological applications should be examined with due respect to the dignity of the human person and universal respect for, and observance of, human rights and fundamental freedoms, ...Proclaims...
Article 2 – The aims of the Declaration are ...**(c)** to promote respect for human dignity and protect human rights, by ensuring respect for the life of human beings, and fundamental freedoms, consistent with international human rights law;
(d) to recognize the importance of freedom of scientific research and the benefits derived from scientific and technological developments, while stressing the need for such research and developments to occur within the framework of ethical principles set out in this Declaration and to respect human dignity, human rights and fundamental freedoms;
Article 3 (1). Human dignity, human rights and fundamental freedoms are to be fully respected.
(2). The interests and welfare of the individual should have priority over the sole interest of science or society."

Although there appears to be divergence between them but on a closer look it appears they co-exist with each other. Article 27 (2) of UDHR says, 'Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.' At the same time ICESCRin Article 15 says, 'The States Parties to the present Covenant recognize the right of everyone: '... **(b)** To enjoy the

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benefits of scientific progress and its applications;

(c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.'

Although these provisions were never claimed but now these are being demanded while demanding the rights of indigenous people for their traditional knowledge and in the wake of the resolution of Sub-Commission on the Promotion and Protection of Human Rights adopted Resolution 2000/7 on Intellectual Property Rights and Human Rights highlighting the incongruities between human rights and intellectual property rights.

Declaration on Right to Development 1986

It declared: "... Considering that the elimination of the massive and flagrant violations of the human rights of the peoples and individuals affected by situations such as those resulting from colonialism, neocolonialism, apartheid, all forms of racism and racial discrimination, foreign domination and occupation, aggression and threats against national sovereignty, national unity and territorial integrity and threats of war would contribute to the establishment of circumstances propitious to the development of a great part of mankind,

Concerned at the existence of serious obstacles to development, as well as to the complete fulfilment of human beings and of peoples, constituted, inter alia, by the denial of civil, political, economic, social and cultural rights, and considering that all human rights and fundamental freedoms are indivisible and interdependent and that, in order to promote development, equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights and ... Proclaims the following Declaration on the Right to Development: Article 1 - The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized."

Human Rights and Good Governance

By the time it has become clear that good governance and human rights have become integral to each other and vital for the functioning of any democracy. "Good governance and human rights are mutually reinforcing. Human rights principles provide a set of values to guide the work of Governments and other political and social actors. They also provide a set of performance standards against which these actors can be held accountable. Moreover, human rights principles inform the content of good governance efforts: they may inform the development of legislative frameworks, policies, programmes, budgetary allocations and other measures. However, without good governance, human rights cannot be respected and protected in a sustainable manner. The implementation of human rights relies on a conducive and enabling environment. This includes appropriate legal frameworks and institutions as well as political, managerial and administrative processes responsible for responding to the rights and needs of the population."

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Right to good Administration has emerged as a fundamental right. Charter of Fundamental Rights of the European Union 2000 in Article 41 recognises this one.

From a human rights perspective, the concept of good governance can be linked to principles and rights set out in the main international human rights instruments. For example Articles 21 and 28 of UDHR, Article 2 of ICCPR and generally ICESCR obliges the states to take steps with a view to achieving progressively the full realization of the rights recognized in the Covenant by all appropriate means.

Right to Water as Human Right

Since late 20th century water has emerged as challenge before the world community and also as a human rights issue. Early human rights documents were primarily concerned with right to life and liberty and not with their broader connotations. Change in time has compelled the world to read them in a broader way not to confine them to narrow interpretations. Water is one of issue connected to the concept of life and recognized by later human rights documents as human right. Convention on the Elimination of All Forms of Discrimination against Women 1979 in Article 14 (2) "States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:

(h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications."

Similarly Convention on the Rights of the Child in Article 24 (1) (2) recognizes the right to clean drinking-water.

Human Rights of Indigenous People

United Nations Declaration on the Rights of Indigenous Peoples 2007 affirmed that "...all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust,... and indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests...and solemnly proclaims ...

Article 1 - Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.

Article 2 - Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity."

Besides these it declares host of other rights like self determination, nationality, self governance, practice of cultural tradition etc as human rights.

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Human Rights of Transgenders

The Supreme Court of India in National Legal Services Authority V. Union of India and others recognized the right of 'Transgenders' to be identified as 'third gender' only on the basis of their human rights. The Court observed: "111. We are of the firm opinion that by recognizing such TGs as third gender, they would be able to enjoy their human rights, to which they are largely deprived of for want of this recognition. As mentioned above, the issue of transgender is not merely a social or medical issue but there is a need to adopt human right approach towards transgenders which may focus on functioning as an interaction between a person and their environment highlighting the role of society and changing the stigma attached to them. TGs face many disadvantages due to various reasons, particularly for gender abnormality which in certain level needs to physical and mental disability. Up till recently they were subjected to cruelty, pity or charity. Fortunately, there is a paradigm shift in thinking from the aforesaid approach to a rights based approach. Though, this may be the thinking of human rights activist, the society has not kept pace with this shift. There appears to be limited public knowledge and understanding of same-sex sexual orientation and people whose gender identity and expression are incongruent with their biological sex. As a result of this approach, such persons are socially excluded from the mainstream of the society and they are denied equal access to those fundamental rights and freedoms that the other people enjoy freely.(See, Hijras/Transgender Women in India: HIV, Human Rights and Social Exclusion, UNDP report on India Issue: December, 2010)."

Expressing disgust at the state of affairs relating to transgenders the court further held: "113. Therefore, gender identification becomes very essential component which is required for enjoying civil rights by this community. It is only with this recognition that many rights attached to the sexual recognition as 'third gender' would be available to this community more meaningfully viz. the right to vote, the right to own property...".

CHALLENGES

In the present milieu human rights are not free from obstacles and challenges. Although human rights have travelled a long path and will continue to travel further with the growth of the civilization, it has to encounter at each new step various issues and challenges relating to its enforcement. Because the Contemporary world is affected by problems like terrorism, widespread poverty, climate change, and many more issues directly having an impact on human rights. At the same time onset of free trade and globalization has unfolded multiple challenges for the protection of human rights.

CONCLUSION

Nowadays human rights have become a catch-word, it is used more and more in the conduct of affairs of state and world affairs than before. At one end the ambit of it growing manifold whereas on the other hand unchecked violation and non-enforcement of it reminding of the futility of the very purpose of establishing the regime of human rights. Inclusion of more and more rights within the fold of human rights shall not serve the purpose rather it may create cynicism and doubt among population because it will dilute the origi-

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nal purpose of human rights, at the same time it will blur the general distinction between the general rights and human rights. So, it is essential to focus more on enforcement than inclusion of rights with in human rights category.

REFERENCES

1. Cited, Louis B. Sohn, The New International Law: Protection Of The Rights Of Individuals Rather Than States available at : *http://www.wcl.american.edu/journa/l/lawrev/32/sohn at p. 17.*
2. Ibid.
3. Universal Declaration of Human Rights 1948 available at : *www.un.org/en/documents/udhr/index.shtml/30.11.13.*
4. International Covenant on Civil and Political Rights available at : *www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf/30.11.13.*
5. International Covenants on Economic ,Social and Cultural Rights available at: *www.ohchr.org/Documents/Professional-Interest/cescr.pdf/30.11.13.*
6. Ibid.
7. Sohn, Supra note 1, at 19.
8. DRAFT CHARTER OF EMERGING HUMAN RIGHTS :Human rights in a globalised world, available at: *http www.guystanding.com/files/documents/Charter_of_emerging_human_rights*
9. Ibid.
10. The Four Freedoms available at : *http://teachingamericanhistory.org/library/document/the-four-freedoms/.*
11. State of the Union Message available at : *http://www.presidency.ucsb.edu/ws/?pid=16518.*
12. Ibid.
13. Sohn, Supra note at 61,61.
14. Sohn, Supra note 1 at 48.
15. Symposium on The Study of New Human Rights: The' Right of Solidarity' "available at: *http://unesdoc.unesco.org/images/0004/000407/040770eo.* Address by the Secretary-General of the United Nations at the opening of the World Conference on Human.
16. Rights, available at : *http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=7906&LangID=E.*
17. Declaration of Sexual Rights, available at : *http://www.tc.umn.edu/~colem001/was/wdeclara.htm.*
18. Universal Declaration on the Human Genome and Human Rights available at : *http://portal.unesco.org/en/ev.php-URL_ID=13177&URL_DO=DO_TOPIC&URL_SECTION=201.html.*
19. Ibid.
20. Available at: *http://www.humanrights.ch/en/Standards/CE-Treaties/Biomedicine/index.html.*
21. Universal Declaration on Bioethics and Human Rights, available at:*http://unesdoc.unesco.org/images/0014/001461/146180e.*
22. Declaration on Right to Development available at : *http://www.ohchr.org/Documents/Issues/Development/RTD_booklet_en.pdf.*

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23. Good Governance Practices for Rhe protection of Human Rights, available at : *http://www.ohchr.org/Documents/Publications/GoodGovernance.pdf.*

24. Available at ; *http://www.europarl.europa.eu/charter/pdf/text_en.pdf.*

25. Available at : *http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf.*

26. Available at: *http://supremecourtofindia.nic.in/uttoday/wc40012.*

N. J. Comp. Law Vol. 2 (1) 2015, pp. 54-62

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CHALLANGE OF COMBATING THE HAZARDS OF WATER POLLUTION-A Legal Perspective

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(Date of Receipt :21-06-2014; Date of Acceptance for Publication : 15-01-2014)

Abstract

The all round developments in the field of Science, Technology, and Industry have disturbed the nature, resulting into not only pollution, Scientists say that Global Warming resulting into melting of glacier and ice on Himalayan region is one of the reasons for the unprecedented thunderbolt, thundercloud and rains with flood.

Article 48-A of our Constitution mandates the State to endeavor to protect and improve environment. Thus, the Parliament enacted the Water (Prevention and Central of Pollution) Act and 1981, the Air (Prevention & Control of Pollution) Act was enacted and also created a separate Ministry of Environment and enacted the Environment (Protection) Act, 1986.

Our Supreme Court is also very sensitive towards this problem and it has addressed this as and when occasion came before it, particularly in the case of Municipal Council, Ratlam Versus Vardichava , Research Foundation of Science Versus Union of India , M.C. Mehta Versus Union of India ,Karnataka Industrial Areas Development Board Versus C. Kenchappa , Essar Oil Limited Versus Halar Utkarsh Samiti , Indian Council for Evniro-Legal Action Versus Union of India , Vellore Citizens' Welfare Forum Versus Union of India , Tirpur Dyeing Factory Owners Association versus Nayyal River Ayacutdars Protection Association and others , People's Union for Civil Liberties Versus Union of India and Another , AP Pollution Control Board Versus Prof. M.V. Nayudu , M.C. Mehta Versus Union of India , M.C. Mehta Versus Union of India , T.N. Godavaram Thirumulpad (104) Versus Union of India and others , and M.C. Mehta Versus Union of India and others , etc. had expressed its concern over environmental degradation and its consequences and laid down laws for the strict pollution control. The Supreme Court also mandated that economic development should not be allowed to take place at the cost of ecology or by causing widespread environment destruction and directed for Sustainable Development and developed a theory of "polluter pays".

Key Words : Global Warming, Article 48-A and Article 51-A of Constitution, Water Pollution,Air Pollution, Environment Protection Act, Supreme Court, environmental degradation, pollution control, Sustainable Development .

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INTRODUCTION

Water is life. Although the entire Universe is full of water or almost a substantial portion of it is water, yet the tragedy is that

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water is the most scarced material for human consumption, particularly for the Indian masses that too for the rural inhabitants. The most tragic aspect is that even after 66 years of our Freedom, we have not been able to provide ordinary drinking water, what to talk of pure drinking water, to our people of rural areas as well as those living in slum areas, labour colonies and hutments in urban cities, despite the Constitutional mandate to the Central as well as State Governments to secure pollution- free Water and Air.

The all round developments in the field of Science, Technology, Agriculture, Mining, Power Generation, Exploitation of Petroleum products, Transport and Industry around the World have disturbed the nature, resulting into not only polluting the Water, Air and Sound, these developments have added further complications resulting into Global Warming. These multi-dimensional developments resulted in pollution of the environment of human.

The crux of the problem is that we want both i.e. a society free from pollution with the ecological equilibrium as well as the latest benefit of scientific technological and industrial developments. Hence, unbridled development would ultimately create havoc, as we have just seen as to what happened in Uttarakhand in this month. Scientists say that Global Warming resulting into melting of glacier and ice on Himalayan region is one of the reasons for the unprecedented thunderbolt, thundercloud and rains with flood.

In Polar region it would be 2-3 times much, resulting into melting of ice on mountains and cold countries which is turn creates flood in rivers and when the flood waters go down to sea, level rises which in turn brings Tsunami in coastal areas and islands. Further Nitrogen oxide generated by petroleum fired engines, pesticides and fertilizer plants, refineries etc. are also damaging in the Ozone layer, which is another cause of rising temperature, because Ozone layer on the Earth prevents the entry of ultraviolet rays. The impact of Ozone concentration together with acid mist have caused adverse effects on greeneries on the earth. Apart from CO_2, Methane Gas emission also affects Earth's climatic conditions on account of absorption of infrared radiation from the surface of the Earth.

The Framers of our Constitution were aware of this grave situation, hence they had provided certain mandates to the respective Governments as well as the citizens as under:

Article 48-A of our Constitution reads as under:-

"*The State shall endeavor to protect and improve environment and to safe guard the forest and wildlife of country.*"

Article 51-A casts a duty on every citizen of India to protect and improve the natural environment including forest, lakes, rivers, wildlife and to have compassions for living creatures. In terms of the aforesaid mandates, the Parliament enacted important legislations to meet the crisis of ecological imbalances. In 1974, it enacted the Water (Prevention and Central of Pollution) Act and 1981, the Air (Prevention & Control of Pollution) Act was enacted. In view of this importance, the Government of India created a separate Ministry of Environment and enacted the Environment

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(Protection) Act, 1986.

The Inter-National Conference on the protection of environment was held at Stockholm , in which the environment is viewed more as resource basis for survival of the present and future generations, thus it resolved that:

'Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations, and

"The natural resources of the earth, including the air, water, lands, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate."

The Environmental Scientists have warned that if the trend of Global Warming is not checked and mitigated by the present generation of the world, it could be catastrophic by the year 2050 be raising Global average temperature to 2 °C. In the U.N. Framework of Convention On Climate Change at Copenhagen, the Capital of Denmark during its summit from December 06th to 18th, 2009 that the year 1998 was the warmest year on record and the first 10 years of the 21st Century – 2000 to 2009 have been the warmest in the recorded history of 160 years.

GLOBAL WARMING

Due the emission of gases like carbon-dioxide (CO_2) and methane in the atmosphere the Global Warming is generated, which is technically called Green House Gases. The Scientists in general and the Environmental Scientists in particular have warned this situation.

The United Nations taken an initiative by organizing U.N. Conference on Human Environment at Stockholm in 1972, which was attended by the 192 World leaders in which principle of sustainable development was unanimously adopted, which was reiterated in the year 2002 in the Johannesburg Summit on Sustainable Development.

CLEAN ENERGY TECHNOLOGY

Our experience of the last 50 years has indicated that neither the scientific researches nor the laws made with a view to combat pollution has been able to mitigate the problem, although at the same time it could not be denied the contributions made by these efforts, otherwise the rate of pollution must have aggravated beyond comprehension and control. Thus the need of the hour is that we have to be right at both fronts by continuously doing researches in the field of Clean Energy Technology and developing laws to balance the equilibrium between industrialization, Urbanization, Modernization and Development in field of Science, Technology, Electronics, I.T. Agricultural modernization etc.

OUR SUPREME COURT'S CONTRIBUTION

Our Supreme Court is also very sensitive towards this problem and it has addressed this as and when occasion came before it. In the case of *Municipal Council, Ratlam Versus Vardichava* reported in AIR 1980 SCC

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1622, the Supreme Court, before whom the citizen of Ratlam had approached complaining sufferings on account of pollution generated by unbearable bad smells from open drains, public excetions of slum dwellers on open land and discharge of effluents from distilleries, had held that human rights calling for unpolluted environment must be implemented irrespective of financial constraints. The public nuisance because of pollutants is challenge to social justice component of the rule of law. This observation was given to reply to the defence taken by the authorities that they have financial crunch.

Our Supreme Court had occasion to scrutinize the guidelines in the case of Research Foundation of Science Versus Union of India reported in (2005) 13 SCC 186, in which it was held that the restrictions imposed by the Central Government in terms of the technical guidelines of the Basel Convention was just and proper. In this, case the Supreme Court observed as follows:

"2. *On consideration of the detailed reports submitted by HPC (High Power Committee) various directions have been issued by this Court from time to time. Presently, we are concerned with the presence of hazardous waste oil in 133 containers lying at Nhave Sheva Prot as notices by HPC. On the directions of this Court, the oil contained in the sold 133 containers was sent for laboratory tests to determine whether the same is hazardous waste oil or not. It has been found to be hazardous waste.*

3. On consideration of the report of HPC, the result of laboratory tests and the entire material on record, this court come to the prima face conclusion that importers illegally imported waste oil in 1333 containers in the garb of lubricating oil. In terms of the order dated 25.09.2003, notices were directed to be issued to 15 importers who imported the said consignment as also to the Commissioner of Customs. The importers were directed to show cause why the consignment shall not be ordered to be re-exported or destroyed at their cost. Since the Ministry of Environment and Forests had spent a sum of sum of Rs.6.35 lakhs on the laboratory tests, the importers were also required to show cause why the said amount be not recorded from them and why all of them shall not be directed to make payment of compensation on polluter-prays principle and other action taking against them.

4. In this view, the Commissioner of Customs was directed to send a report to this Court on the question whether the consignment in issue is waste all within the meaning of the term "waste oil" as per the Base Convention of the Hazardous Wastes Rules, 1989 as amended in the year 2000 and/or as amended in the year 2003 also having regard to the relevant notifications issued on this aspect.

5. It deserves to be noted that the question to be determined in these proceedings is limited to the environment issue. The issue is in regard to the appropriate directions for dealing with the consignments in question, having regard to the precautionary principle and polluter-pays principle. The main question is whether directions shall be issued for the destruction of the consignments with a view to protect the environment and, if not, in what other manner the consignments may be deal with.

6. ……..

7. Furnace oil is basically im-

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ported in bulk on account of its large volumetric requirements by the industry and its relatively low value makes its imports as containerized cargo economically unviable unless the value is suppressed, or some other mid. Declaration was resorted to, to offset the increased cost of packing and transportation of containers.

…… initial testing of samples, by the Custom House Laboratory, drawn from some of the consignments indicated that the goods were not furnace oil. The laboratory, however, could not categorically state whether the samples were used /waste oil, as they did not have standards/ specification of used waste oil… The test results forwarded by CRCL in all the 14 samples indicated that none of the samples tallied with the specifications of furnace all and all were off-specification material i.e. waste oil. Thereafter CIU seized oil the consignments involving 158 containers. One consignment comprising of 25 containers was conditionally released on execution of bank guarantee for differential duty. Thus a total of 133 containers were left……..in view the fact that since hazardous wastes imported in violation of the provisions of the Environment (Protection) Act, 1986 had to be re-exported or deal with as provided for in the Hazardous Wastes (Management and Handling) Rules, 1989. Personal hearings were held in several cases by the Commissioner, Mumbai for adjudication of these cases……..Particular concern centers on a family of substances known as Polychlorinated Biphenyls (PCBs) which combine excellent insulation heat transfer characteristics, with high stability and non-inflammability. However, they are environmentally extremely persistent and bio-accumulative, toxic (and and suspected carcinogen), and if burnt under unsuitable conditions, will give rise to toxic products of combustion including dioxins and dibenzofurons …….

8. -28. x x x

29. The polluter-prays principle basically means that the producer of goods or other items should be responsible for the cost of preventing or dealing with any pollution that the process causes. This includes environmental cost as well as direct cost to the people or property. It also covers cost incurred in avoiding pollution and not just those related to remedying any damage. It will include full environmental cost and just which are immediately tangible.

30.- 31 x x x

32. In M.C. Mehta Versus Union of India 4(1987) 1 SCC 395 a Constitution Bench has held that the rule in Rylands Versus Fletcher (1886) LR & HL – 330 laid down in the British jurisprudence the principle of liability that if a person who brings on to his land and collects and keeps there anything likely to do harm and such thing escapes and does damage to another, he is liable to compensate for the damages caused. This rule applies only to non-natural user of the land and it does not apply to things naturally on the land or where the escape is due to an act of God and on act of a stranger or the default of the injured or where or where the thing which escapes is present by the consent of the person injured or in certain cases where there is a statutory authority.

33 - 38 x x x

39. The aforesaid 133 containers are directed to be expeditiously destroyed by incineration as per the recommendations of the Monitoring Committee and under its supervision subject to and in terms of this order. The cost of incineration shall

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be deposited by the importers with the Monitoring Committee within four weeks. The Monitoring Committee will ensure the timely destruction of the all at the incinerators mentioned in its report. After the destruction of the oil in question, a compliance report shall be filed by the Monitoring Committee. All concerned are directed to render full assistance and co-operation to the Monitoring Committee. In regard to the consignment of Eleven Star Esscon, in case option for recycling is exercised by the Government, the recycling would be done under the supervision of the Monitoring Committee. If the request for recycling is not received by the Monitoring Committee within four weeks, the said consignment would also be destroyed in the same manner as the other consignments."

Our Supreme Court in a landmark judgment which ordered on the strength of various Anti-pollution Laws in general and Environment (Protection) Act in particular to converts all diesel operated public transport vehicles to C.N.G. and shifting the Industries of certain categories toxic gases outside the National Capital Region of Delhi.

The Supreme Court in the case of Karnataka Industrial Areas Development Board Versus C. Kenchappa and others reported in (2006) 6 SCC 371 had expressed its concern over environmental degradation and its consequences and observed as follows:-

"41. Experience of the recent past has brought to us the realization of the deadly effects of development on the ecosystem, the entire world is facing a serious problem of environmental degradation due to indiscriminate development, industrialization, burning of fossil fuels and massive deforestation are leading to degradation of environment. Today the atmosphere level of carbon dioxide, the principal source of global warming, 26% higher than pre-industrial concentration.

The rises in global temperature has also been confirmed by the Inter-Governmental Panel on Climate change set up by the United Nations in its final report published in August 1990. The global warming has led to unprecedented rise in the sea level. Apart from melting of the polar ice it has led to inundation low-lying coastal regions. Global warming is expected to profoundly affect species and ecosystem. Melting of polar ice and glaciers, thermal expansion of seas would cause worldwide flooding and unprecedented rise in the sea level if gas emissions continue at the present rate. Enormous amount of gases and chemicals emitted by the industrial plants and automobiles have led to depletion of ozone layers which serve as a shield to protect life on the earth from the ultraviolet rays of the sun.

43. The dumping of hazardous and toxic wastes, both solid and liquid, released by the industrial plants is also the result of environmental degradation on our country.

44. The problem of "acid rain" which is caused mainly by the emission of sulphur dioxide and nitrogen oxides from power stations and industrial installations is graphic example of it. The ill-effects of acid rain can be found on vegetation, soil, marine resources, monuments as well as on humans. Air pollutants and acids generated by the industrial activities are now entering forests at on unprecedented scale."

In a case of Essar Oil Limited Versus Halar Utkarsh Samiti reported in (2004) 2 SCC 392, the Supreme Court, while referring to the Stockholm Declaration 1972,

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held as under:

"*This therefore, is the aim, namely, to balance economic and social needs on the one hand with environment considerations on the other. But in a sense all development is an environmental threat. Indeed, the very existence of humanity and the rapid increase in the population together with consequential demands to sustain the population has resulted in the concreting of open lands, cutting down of forests, the filling up of takes and pollution of water resources and the very air which we breathe. However, there need not necessarily be a deadlock between development on the one hand and the environment on the other. The objective of all laws on environment should be to create harmony between the two since neither one can be sacrificed at the altar of the other.*"

In another important case, the Supreme Court in the case of Indian Council for Evniro-Legal Action Versus Union of India reported in (1996) 5 SCC 281 had, observed follows:-

"While economic development should not be allowed to take place at the cost of ecology or by causing widespread environment destruction and violation; at the same time, the necessity to preserve ecology and environment should not hamper economic and other developments. Both development and environment must go hand in hand, in other words, there should not be development at the cost f environment and vice versa, but there should be development while taking due care and ensuring the protection of environment."

The Apex Court in the case of Vellore Citizens' Welfare Forum Versus Union of India reported in (1996) 5 SCC 647 had acknowledged the concept of Sustainable Development under which both the development and ecology can grow together and not one at the cost of another, as formulated by Bruntland Reported.

The Apex Court in the same case also had observed as under:

"100. The importance and awareness of environment and ecology is becoming so vital and important that we, in our judgment, want the appellant to insist on the conditions emanating from the principle of "Sustainable Development":-

(i) We direct that, in future, before acquisition of lands for development, the consequence and adverse impact of development on environment must be properly comprehended and the lands be acquired for development that they do not gravely impair the ecology and environment.

(ii) We also direct the appellant to incorporate the condition of allotment to obtain clearance from the Karnataka State Pollution Control Board before the land is allotted for development. The said directory condition of allotment of lands be converted into a mandatory condition for all the projects to be sanctioned in future.

101. *This has been on interesting judicial pilgrimage for the last four decades. In our opinion, this is a significant contribution of the judiciary in making serious endeavour to preserve and protect ecology and environment, in consonance with the provisions of the Constitution.*

102. Sustainable use of natural resources should essentially be based on maintaining a balance between development and the ecosystem. Coordinated efforts of all concerned would be required to solve the problem of ecological crisis and pollution. Unless we adopt approach of sustainable use, the problem of environmental degradation cannot be solved.

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103. The concept of sustainable development was propounded by the "World Commission on Environment and Development", which very aptly and comprehensively defined it as "development that meets the needs of the present without comprising the ability of future generations to meet their own needs". Survival of mankind depends on following the said definition in letter and sprit."

The Supreme Court in a latest judgment rendered in Tirpur Dyeing Factory Owners Association versus Nayyal River Ayacutdars Protection Association and others while relying the principle of "polluter pays" observed the following principles:-

"it is the duty of the State to protect and preserve the ecology, as Article 21 of the Constitution guarantees protection of life and personal liberty and every person has a right to pollution free atmosphere. Therefore, the "precautionary principle" and the "polluter-prays" principle have been accepted as a part of the law of the land being the part of environmental law of the country."

Similar view has been reiterated in People's Union for Civil Liberties Versus Union of India and Another , (1997) 3 SCC 433; AP Pollution Control Board Versus Prof. M.V. Nayudu , AIR 1999 SC 812; and M.C. Mehta Versus Union of India , (2001) 9 SCC 142, observing that environment and ecology are national assets. They are subject to inter-generational equity. The sustainable development principle is a part of Articles 21, 48-A 51(g) of the Constitution of India. In M.C. Mehta Versus Union of India , (2004) 12 SCC 118, this Court explained the scope of "precautionary principle" observing that it requires anticipatory action to be taken prevent harm. The harm can be prevented even on a reasonable suspicion. It is always necessary that there should be direct evidence of harm to the environment. The concept of "sustainable development" has been explained that it covers the development that meets the needs of the person without comprising the ability of the future generation to meet their own needs. It means the development, that can take place and which can be sustained by nature/ecology with or without mitigation. Therefore, in such matters, the required standard is that the risk of harm to the environment or to human health it to be decided in public interest, according to a "reasonable person's test. The development of the industries resources, irrigation, resources and power projects are necessary to improve employment opportunities and generations of revenue, cannot be ignored. In such eventuality, a balance has to be struck, for the reason that if the activity is allowed to go, there may be irreparable damage to the environment and there may be irreparable damage to the economic interest.

A Similar view has been reiterated by this Court in T.N. Godavaram Thirumulpad (104) Versus Union of India and others , (2008) 2 SCC 222; and M.C. Mehta Versus Union of India and others , (2009) 6 SCC 142. The Court observed:

"In case in spite of stringent conditions, degradation of environment continues and reaches a stage of no return, the court may consider the closure of industrial activities in areas where there in such a risk. The authorities also have to take into consideration the macro effect of wide scale land and environmental degradation caused by absence of remedial measures."

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CONCLUSION

The current system of mitigating rising pollution is inadequate thus Global efforts are required to be done afresh particularly keeping in view the all round developments taking place in the World in the fields of industries, deforestation, urbanization, automobile movements, use of fertilizers in cultivation, dependence on electronics and computers and power plants etc. Equally, important aspect of the problem is to examine the operational aspect of the various laws enacted to safeguard the environment and continued efforts to amend the loopholes in the present laws and further enactments as per the requirements like Noise Pollution Control law. Water harvesting and Water Adsobtion are some of the concrete and effective steps are evolved by the Environmental Scientists to mitigate the monstrous face of one of the aspects of pollution. The legal system is also moving hand in hand in this direction determined to save the humanity from being extinct as has been the fate of some of the species, which became extinct during the last 3.6 billion years ago due to cataclysmic changes in the environment.

REFERENCES

1. Lecture delivered in Dr. R.M.L. Avadh University, Faizabad (U.P.) as a Special Guest on 27.7.2013 at the National Symposium on ' Water Treatment by Adsorption'..
2. AIR 1980 SCC 1622
3. (2005) 13 SCC 186
4. 4(1987) 1 SCC 395
5. (2006) 6 SCC
6. (2004) 2 SCC 392
7. (1996) 5 SCC 281
8. (1996) 5 SCC 647
9. 2009 (27) L.C.D.1442
10. (1997) 3 SCC 433
11. AIR 1999 SC 812
12. (2001) 9 SCC 142
13. (2004) 12 SCC 118
14. (2008) 2 SCC 222;
15. (2009) 6 SCC 142
16. Supra f.n. 2
17. Suprs f.n. 3
18. Supra f.n. 4
19. Supra f.n. 5
20. Supra f.n. 6
21. Supra f.n. 7
22. Supra f.n. 8
23. Supra f.n. 9
24. Supra f.n. 10
25. Supra f.n. 11
26. Supra f.n. 12
27. Supra f.n. 13
28. Supra f.n. 14
29. Supra f.n. 15

N. J. Comp. Law Vol. 2 (1) 2015, pp. 63-76

ISSN : 2393 - 9338

ASSESSMENT OF ANTI-TRUST ENFORCEMENT OF CARTELS

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(Date of Receipt :20-06-2014; Date of Acceptance for Publication : 04-01-2015)

Abstract

Cómpetition law defends the practice of fair competition. The reasons for having legal framework for competition in market is to remedy those instances where the actions of individuals causes the collapse of free market system. The MRTP Act, 1969 was passed to prevent monopolization or concentration of economic power. Section 2(c) of the Competition Act, 2002 explicitly defines Cartels as an association of producers and sellers etc., who, by agreement amongst themselves limit or control the production, distribution etc. to the detriment of consumer. For the existing competitors who are not a part of the cartelists will tend to increase their output if the cartelists increase their price, thus it would facilitate new entry into the market. The MRTPC found itself lacking on many fronts when it came to dealing with cartels. It was not empowered to impose penalties, but the Competition Act empowers the Competition Commission of India to pass stringent orders and impose fines in form of penalty. However, under the Competion Act, any order or direction or decision of the commission can be appealed in Competition Appellate Tribunal (COMPAT) within 60 days.

Key Words : Cartels, detection of cartels, profit, competition law, consumer, market, price, MRTP Act, Competition Commission of India, restrictive trade practices, leniency scheme

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INTRODUCTION

"*People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or some contrivance to raise prices. It is impossible indeed to prevent such meetings, by any law which either could be executed, or would be consistent with liberty and justice. But though the law cannot hinder people of the same trade from sometimes assembling together, it ought to do nothing to facilitate such assemblies; much less to render them necessary.*"

- Adam Smith, The Wealth of Nations (1776).[1]

Competition law defends the practice of fair competition. [2] One of the reasons for having legal framework for competition in market is to remedy those instances where the actions of one or more individuals or entities or organizations causes the collapse of free market system. It is important to lay down rules of the game so that every participant of the market has a fair and equal chance of flourishing.[3]

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With the growth of both volume of transactions and the complexity of economies, jurisdictions across the globe have come to realize the need and benefit of having a well-defined competition policy and probably this is the reason the antitrust regime has seen the fastest growth when compared to other economic regulations. It is widely accepted, though some economists rebut the idea that competition law acts as a catalyst in promoting innovation and economic growth along with social progress of the nation.

Antitrust laws prevent individual or collective acts or any other form of negative cooperation that adversely affects competition and functions to set prices at altitudes at which market can breathe, largely without interference and in a way that cannot be done through central control. Competition laws can be seen differently in different countries be it in under the broad guarantee of freedom to carry on any trade or business under Article 19(1) (g) of Indian Constitution or as Constitution itself of free market economy in Germany or like position in US which treats the Sherman and the Clayton Act as *magna carta* of free enterprise. Rules of the market are simple. What is most important is that the prices are determined honestly through market forces and benefit should accrue to those who innovate and endeavour to provide the 'best value for money.' The competitive process should not be undermined by private understandings where market participants start working together instead of competing against each other.

There is no denying fact that some scholars have raised questions about the existence of antitrust laws and see them in complete violation of laissez-faire capitalism and therefore an expensive nuisance and ultimately self-defeating.[4] Accordingly, only those actions that are in aggression of on the right to property can be said to be illegal. For e.g. Robert Bork makes a distinction between economic choices that increases efficiency and others that curtail productivity and how often the antitrust laws fail to make the distinction. Attempt should be made to promote efficiency enhancing activities to promote consumer welfare and only those actions that restrict output should be prohibited. On the other hand, William Markaham (2006) does not see the aim of competition law to punish big corporate bodies or serve as a 'surrogate consumer protection.' Anti-trust laws are not anti-market and exists to enhance the growth of the economy by bringing out the best in each market participant.

Indian competition regime is fairly new when compared when compared to its counter parts. The Monopolies and Restrictive Trade Practices Act, 1969 was passed subsequent to finding and recommendations of Mahalanobis (1960) and Monopolies Inquiry Commission (MIC) (1964) to prevent monopolization or concentration of economic power. MRTP can be said to be the precursor of Competition Act, 2002 and can be considered as a move from preventive mechanism to developmental mechanism. The LPG model coupled with the shortcomings of MRTP paved the way for passing of new Act on the recommendation of Raghavan Committee. Doing away with prohibitory provisions for monopoly trade practices, restrictive trade practices and Unfair trade practices, the new Act has three major provisions which deal with 'Anti-competitive agreements, Abuse of dominance

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and Regulation of Combinations.'[5] Section 3 is designed to prevent, along with conspiracies and monopolies against consumers, such unfair practices against smaller competitors, and also such other practices, that unfairly disadvantage competitors or injure consumers. It therefore, provides for prohibition of entering in to agreements in respect or goods or services which causes or is likely to cause an appreciable adverse effect on competition within India.

Interestingly, anti-trust legislations do not define the term 'competition'. The reason probably is to keep the understanding fluid or circumstantial. Loosely, it is a term used to denote the race for betterment without the illegal fetters. Competition policy, therefore, is a mechanism to ensure that it is not restricted to the 'prejudice of both market and society'[6] in ways such as dipping of production, bringing down the value of product, decentivises improvement or modernization or taking away the option to choose from the consumers.

Prevention of anti-competitive agreements is envisaged under section 3 and though not expressly worded include both horizontal and vertical agreements. The Rule of Reason and the Rule of Presumption attached to vertical and horizontal agreements are suggestive on whom the 'burden of proof' lies. The provision does not define or give a test for determining AAEC[7] but an assessment can be made on the parameters given under S. 19(3). The provision whether exhaustive or only illustrative and whether all factors are supposed to be taken into account or any one test would suffice remains a bone of contention. [8]

Economy benefits through fair competition. It is only when entities decide to act together instead of competing, a cartel starts to function and actions like fixing of prices, allocation of market, bid rigging, controlling the supply or restricting the availability of products in the market, comes out as a consequence. Such collusions can be both domestic and international.

Cartels were not defined in the MRTP Act, 1969, but the understanding of cartels could only possibly be drawn from the Section 2(o) i.e. restrictive trade practice. The Competition Act, 2002 explicitly defines Cartels under section 2(c) of the Act. – "*Cartels includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves limit, control or attempt to control the production, distribution, sale or price of, or trade in goods or provision of services*".[9] "Cartels" are regarded as most grave competition infringements and 'supreme evil of antitrust'.[10]

A group of sellers or buyers bonding together and attempting to eliminate competition will give rise to a cartel, commonly referred to as 'Collusion'. According to the economic theory there are two forms of collusion: **express and tacit collusion.**[11] In economics the difference is of limited importance, however in the legal parlance there is a stark difference between the two. Express collusion[12] is strictly prohibited in many jurisdictions including several member states of European Union and is a criminal offence. Tacit collusion[13] is permitted. A 'hard-core' cartel as defined in the OECD Recommendation is:

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...an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories or lines of commerce.[14]

Reasons for Cartel Behaviour

'Game theory'[15] and the "Prisoner's Dilemma game'[16] can be used to explain the purposes of collusive behaviour by firms and the success of the action relies on two aspects: firstly, whether the entities can reach to an agreement and secondly, whether the understanding can be sustained over a period of time. "**The coordination can last for a long period only if the 'cheating firms' accrue huge benefits**."[17] A market with an elastic demand, firms colluding on price might not be of much help because the customers will not tolerate the price above the competitive level and will source from the other suppliers. For the existing competitors who are not a part of the cartelists will tend to increase their output if the cartelists increase their price, thus it would facilitate new entry into the market. The economic theory tells us that cartels will be inherently unstable since there will always be an incentive to cheat.

Difficulty of detecting Cartel cases

Cartels are by their nature hidden and secret.[18] It is always a tricky job for the regulators to establish cartel and generally have to rely on indirect evidence to prove the same. It is always complicated and difficult to identify cartel behaviour and if the penal consequences are not enough, the participants of collusion may develop the impression that the profits that might arise from such activity will outweigh the risk of sanctions. Therefore, it is always stressed that the penal sanctions for cartelization must me much higher than the benefits accrued. It is somewhat settled across jurisdictions that cartel are per se bad and no reason shall justify the same be it in the name of consumer interest or otherwise.

Regulations under Competition Act, 2002

'Cartels' are included in the category of agreements, which are presumed to have appreciable adverse effect on competition (AAEC).[19]

"Cartels are agreements between enterprises (including association of enterprises) not to compete on price, product (including goods and services) or customers. The objective of a cartel is to raise price above competitive levels, resulting in injury to consumers and to the economy. For the consumers, cartelization results in higher prices, poor quality and less or no choice."[20] Three essentials of a cartel can be marked out: firstly, an agreement (inclusive of any arrangement or understanding), secondly, the said agreement is between entities engaged in similar trade of goods or services and thirdly, the agreement is aimed towards limiting or 'controlling the production, distribution, and sale or price of, or, trade in goods or provision of services.' Due to its pernicious effect, cartels are presumed to have AAEC as in these types of agree-

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ments, the participants decide not to compete on price, product, customers etc. thereby limiting the very essence of competition in market in benefitting different stakeholders.[21] Since, cartel formation is illegal, the participants of such collusion keep such agreement secretive and more often than not they are not reduced to writing.[22] Moreover, the best evidence against 'Cartel' is usually in possession of the charged parties, which are not likely to easily part with and make available to the investigator or enquiring authority. These compulsions seem to have persuaded the law makers to prescribe that 'Cartel' is presumed to have AAEC. [23]

Presence of gateways

Competition Act of India does not provide for public interest gateway and since, cartel is presumed to have AAEC, the burden of proof is on the accused to show that the practice did not have any significant impact on the competition in the market which are then analysed in the light of factors as per S.19 or other circumstantial evidences.

Explanation of one's own action of cartelisation on the foundation that the accused is itself a dominant actor in the market.

"In a buyer-supplier relationship, if, for example, the buyer-firm happens to be a dominant firm, the supplier-firms may have an incentive to enter into a cartel-type agreement to counter the dominant position of the buyer." The regulator in these types of instances has to go an extra mile in pressing on the supplier entity against such agreement and encouraging them to approach the regulator if the buyer firm tries to abuse its dominant position. Section 19 of the Act empowers the CCI in accepting anonymous complaint to initiate enquiry.[24] From 2009 to 2013, CCI passed 63 orders related to abuse of dominance[25] which goes on to highlight the fact of anti-competitive behaviour by dominant firms and which also makes the entering of cartel agreement to counter abuse of dominance more imminent.

Powers of the Commission

The MRTPC found itself lacking on many fronts when it came to dealing with cartels. It was not empowered to impose penalties. The CCI is authorized under section 27 of the Competition Act to pass stringent orders and impose fines in form of penalty equivalent to three times of the amount of profits made out of such agreement by the cartel or ten per cent of the average turnover of the cartel for the last preceding three financial years, whichever is higher on confirmation of cartel activity. Moreover, MRTPC was not given extra-territorial jurisdiction and it could only take action for anti-competitive agreement if it involved an Indian party and that too only after *the goods have been imported into India*.[26] Section 32, undoing the Supreme Court order in the Soda Ash cartel and based on the accepted principle of '*Effects Doctrine*' in antitrust jurisdictions across globe, give extra-territorial reach to CCI to enquire and investigate any agreement which is likely to have adverse effect on the competition in India irrespective of the geographical location of the parties involved.

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Leniency Scheme

The CCI has moved ahead from the mere cease and desist orders of MRTPC to imposition of heavy fines and sanctions. From 2009 to 2013 CCI has passed 58 orders related to cartels and other anti-competitive agreements which proves the will and effectiveness of increased powers to the regulator.[27] However, the Competition Act, 2002 has a leniency provision which essentially is a mechanism to nab ongoing cartel activity. It facilitates disclosure of anti-competitive activity from any participant of it by giving them exemption from any sanction. This applies to any producer, seller, distributor, trader or service provider included in any cartel that has allegedly violated the Competition Act provisions regarding anticompetitive agreements and who makes a full and true disclosure in respect of the alleged violation. However, there are certain condition attached to availing of this scheme. "There are, however, four other conditions: (1) the disclosure must be vital; (2) the disclosing party must continue to co-operate with the CCI until the completion of the proceedings before the CCI; (3) the disclosing party must not have concealed, destroyed, manipulated or removed the relevant documents in any manner that may contribute to the establishment of a cartel; and (4) the disclosure should be made before the report of the investigation by the Director General, as directed by the CCI, has been received. This leniency provision has proved to be a powerful tool in the detection and destabilisation of cartels. It has also encouraged parties to disclose a cartel's existence to the competition authorities." [28]

In pursuance to Section 64 of the Act the CCI, the Competition Commission of India (Lesser Penalty) Regulations, 2009 were brought out in August 2009[29] which provide the framework under which the CCI can impose lesser penalties than statutorily provided in cartel activity.

Interim Order

The Commission can also pass interim orders u/s 33 during the pendency of any investigation or inquiry to restrain any party from continuing with the alleged anti-competitive activity until the inquiry is complete or as the Commission may deem fit. Any order or direction or decision of the commission can be appealed in Competition Appellate Tribunal (COMPAT) within 60 days.[30]

Detection of Cartels

Detection of anti-competitive activity in the form of cartel is of greatest concern for the regulator. Generally, the information provided by former personnel, market consumers, whistle blowers, suo moto investigations by Regulator etc. are the basis of cartel detection. Theoretically, structural or behavioural methods are utilized for identifying cartels. The former focuses on identifying traits of markets which facilitate collusion. For e.g. it is generally seen that cartels are more in markets with lesser market players, homogenous products and stable demand.[31] The

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volatility of industrial turnover also is an important indicator. Changes in market shares or 'regular exits and entrants' does not facilitate cartel. Grout and Sonderegger (2005, p. 15) is representative of this approach:

"*..... the fundamental background reduces to three core issues - product, volatility, and company criteria. The first core question is whether the industry has a homogeneous product or not. Cartels are far more likely if the product is fairly homogeneous between companies in the market.*

... Second, does the industry display volatile turnover over a sustained period of time? Cartels are more likely if output and market conditions are normally stable. ... Finally, are the leading players in the market large and relatively constant? If there are significant changes in the market shares or regular exits and entrants then cartels are less likely."[32]

Behavioural approach on the other hand will try to observe the inter-firm co-ordination or will analyse the consequence of such co-ordination. Means of co-ordination become important and form essential part of evidence to prove cartel. Market effect of collusion can also be seen in behavioural approach. A sharp rise in price or price parallelism can indicate a cartel activity.[33]

Price Parallelism and Cartelisation

The regulators in almost all oligopolistic jurisdictions have failed to develop suitable evidentiary standards for recognizing various types of settlements. In these types of market set up, entities act in a manner where they recognize their mutual interdependence.[34] Therefore, price parallelism is generally not taken as authoritative evidence for collusive activity as the same can emerge even when entities are not acting collusively but through a general understanding of their 'role in the repeated oligopoly game.' [35]

Therefore, circumstantial evidences, referred to as Plus Factors are required to prove anti-competitive activity. However, the interpretation of Plus factors has varied from case to case and is difficult to draw one principle.[36] Many scholars have commentators have compiled plus factors and discussed the critical mass of circumstances that ought to justify an inference that observed behaviour is the product of concerted action. "*there is persistent dissatisfaction with the analytical methods commonly used in antitrust enforcement and litigation to distinguish plus factors in terms of their probative value.*"[37] The inadequacy of proper test will inhibit the economically workable resolution of many cartel cases and will have prove a hindrance in anti-cartel enforcements.

Profits as proof of Collusion[38]

It is important to make the distinction between legitimate collaboration or co-operation and illegal collusion. It will also be erroneous to presume cartelization or anti-competitive activity by the mere fact of high profits which may be owed to various market factors from increased efficiency to rise in demand. "The UK Office of Fair trading (OFT) guidelines on the assessment of market power suggest that the following conditions need to exist before a firm can be held to be making excessive profits in an anticompetitive

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sense: (1) the profit should be substantially above the cost of capital and earned on a persistent basis; and (2) there is no evidence that new entry is likely to undermine such profits in the medium-term."[39] The formation and persistence of cartel hugely depends on forces somewhat unique to each market. Some of the notable features of the market that favour collusive behaviour are inelastic demand[40] of the goods where the manufacturer can raise the prices without affecting the demand (sectors like oil and gas, cement, steel, power and other essential products linked to the automobile or construction sectors, there is greater scope for huge profits by price rise and collusive behaviour), smaller number of players in market giving higher profit incentives for cartel formation, higher market barriers that prevents a new market entrant from entering the market and stable demand.

The Indian Encounter

Cartelization is a phenomena that is not new to Indian market and even after huge efforts put in by the Regulator after the CCI became fully operational, it continues to exist. Cases in Sectors like cement, steel, tyres, trucking, family planning device (Copper T), film distribution etc. along with the effect of foreign cartel formations in sectors soda ash, bulk vitamins, petrol etc. are evidences of the same. Few of the Indian cartel cases are highlighted below:

Trucking cartel

This case of 1984 relates to collusion and fixation of freight rates by Bharatpur Truck Operators Union and the Goods Truck Operators Union. The MRTPC as empowered could pass only cease and desist order and no fine was imposed.

Film Trade Associations Case 2013

The petitioners in the case complained that the respondents were acting like a cartel in banning or boycotting Hindi films to be displayed in multiplexes. Since, the respondents controlled the production and distribution of almost 100% of the Hindi Films produced/supplied/distributed in India, they exercised complete control over the Indian Film Industry. A penalty at the rate of 10% of the average profits of last three years was imposed by CCI and warned the film associations from making any discrimination between regional and non-regional films.

LPG Cartel

IOCL had invited bids for supply of 105 lakh, 14.2 Kg capacity cylinders to various bottling plants in 2009. Out of 63 bidders 50 were qualified for opening of price bids. The bids of large number of parties were exactly identical or near to identical which indicated of some sort of agreement and understanding between the bidders. The Competition Commission of India investigated the case suo-moto. Out of 50 bidders 37 belonged to different groups so it was usual to get such identical bids in different States. On investigation it was found that the LPG cylinder manufactures met in a Hotel in Mumbai before the date of submission of price bids and discussed tenders. The manufacturers were held responsible for cartels and infringement of Section 3(3) of the Competition Act 2002. The CCI imposed a penalty at the rate of 7% of the average turnover of the each company.

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Cement cartel

In a landmark order in terms of both fine imposed and the approach taken (parallelism plus) by the regulator, CCI slapped a fine of Rs. 6,307 crore on 11 major ment manufacturers and the Cement Manufacturers' Association (CMA) for cartel conduct leading to price fixation and limiting production and supply of cement. The cement case was brought before the CCI by the Builders' Association of India (BAI) under Section 19 of the Competition Act, alleging concerted action by 11 cement companies to raise prices by limiting supply and controlling production. The commission observed that parallel behaviour in prices, dispatch, supply, accompanied with some other factors indicating coordinated behaviour among the firms may become a basis for finding contravention or otherwise of the provisions relating to Anti-competitive Agreement of the Act (para 6.5.8).

Criminalisation of cartel conduct

U.S. Deputy Assistant Attorney General for Criminal Enforcement Scott Hammond proclaims, "[i]n the last two decades, the world has seen the proliferation of effective leniency programs, ever-increasing sanctions for cartel offenses, a growing global movement to hold individuals criminally accountable, and increased international cooperation among enforcers in cartel investigations." There has been a growing tendency across jurisdictions to criminalize cartel conduct. US has been the frontrunner for imposing criminal sanctions where stress is laid on the individual accountability serving as the best deterrence mechanism. Consequently, more than 30 countries have criminalized cartel conduct, 20 of which have done after 2000. 'Individuals now face potential imprisonment for cartel activity in Australia, Brazil, Canada, Iceland, Indonesia, Israel, Japan, Korea, Norway, Russia, Thailand, and Zambia, in addition to in the U.S. and a majority of E.U. member states.' Most of these countries moved from civil fines to criminal sanction to achieve some sort of deterrence and majorly because they believed that cartel conduct is inherently bad and criminal analogous to other offences.

However, one has to be mindful of the fact that results seen in US were hardly repeated in any other jurisdiction. Research carried out by University of Melbourne to study effect of criminalization in Australia between 2009-11 in the 'Cartel Project' highlighted major weakness in the theory of criminalization.

Merely replacing civil/administrative sanction with criminal sanctions will not guarantee better use of public money. In criminal prosecutions burden of proof is much higher than civil cases and thereby will require more resources, which many regulators across the globe find difficult to address. The comprehensive review of New Zealand competition enforcement system pointed out that criminalisation has actually harmed anti cartel efforts. Convictions are rare which again has negative impact on the leniency program and also de-incentives legal compliances for companies. "With a lame duck leniency program, fewer cartels will be detected, with the inevitable effect that lesser competition crimes will be prosecuted. We would end risking with criminalise system with neither criminals nor preventive ef-

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fects." Therefore, one must wait and ponder before advocating criminalization and probably if the leniency program can be improved, better cartel enforcements can be done.

CONCLUSION

It becomes very pertinent to have a deeper sense of understanding of how cartels function and how it can be differentiated from competitive behaviour in terms of either fixing of price or allocation of market. What we need is a model for identifying both hard core cartels and tacit collusions. The model thus can be evolved by careful study of cases for different types of cartel activity under MRTP/Competition Act or from foreign jurisdictions and which can also help in identifying industry traits that leads to formation of cartel.

To nab cartels, regulators devised the leniency scheme in the regulatory framework. The leniency scheme tempts the participants of collusion to finish off the cartel itself. Leniency schemes sounds good on paper and is a common provision in the antitrust laws of most of the OECD countries but has the program really yielded any result and if yes, to what extent. According to some economists, leniency scheme works only in weaker cartels where the incentive for collusion is much lower than the degree of risk taken. And for bigger cartels, the participants rather chose to stay in and reap the benefit instead of owning up.

Demands have always been made in favor of criminalization of antitrust enforcement or for imposing penal sanctions for violations of provisions of competition act. Imposing criminal sanction is not new and many jurisdictions across the globe have already done that. Can enforcement mechanism of countries like US, South Africa, Australia serve as yardsticks for India to follow has to be looked into through the experience of Regulators in these jurisdictions. According to Dr. David Lewis, Executive Director, Corruption Watch, South Africa, jumping to criminal sanctions for anti-competitive behaviour can be tricky, both in the form of enforcement and subsequent redundancy of the leniency scheme. Also, the powers of the regulator has to be seen if they allow such a move. Lack of efficient evidence collection mechanism with greater burden of proof required in criminal cases can make the change counter-productive.

Most of the cases in India with respect to Section 3 and especially cartels are based on the premise of common behavioural patterns. International jurisprudence shows that price parallelism cannot alone establish cartel behaviour and supporting factors (PLUS Factors) needs to be produced. The Competition Commission of India, although agrees in principle with the above stand has rather been non-uniform in its orders in following the principle. It is yet to be seen as to how CCI develops the jurisprudence around price-parallelism and plus factors. What will be seen as acceptable as corroborative evidence will have to be dealt.. Similarly, it will be worthwhile to analyse how CCI can use International norms and practices to deal with cases with respect to abuse of dominance through anti-competitive agreements. CCI, being an agency which has started running completely only recently has been created on lines of established foreign regulators. It is more than obvious that CCI looks at more ma-

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ture jurisdictions for guidance.

REFERENCES

1. Adam Smith, "An Inquiry into the Nature and Causes of the Wealth of Nations," (1776) V, 1, Para 178
2. House of Lords Debate during passage of Competition Act, 1998; Mark Fuse, COMPETITION LAW OF EC AND UK, 6th ed., 2008, pg.2.
3. CCI v. SAIL (2010) 10 SCC 744 para(1-7).
4. For e.g. refer to arguments made by defense in the Electricity Cartel; J . Fuller, The Gentlemen Conspirators (1962); J. Herling, The Great Price Conspiracy (1962).
5. Sections 3-6, Competition Act, 2002.
6. Massimo Mota, COMPETITION POLICY: THEORY AND PRACTICE 3O (2004). The benefit of competition to consumers comes in the form of lower prices and better products.
7. Appreciable adverse effect on competition, S. 3, 19, Competition Act, 2002.
8. See Automobile Dealers Association v. Global Automobile ltd & Anr CCI order 2012.
9. In the Competition Act, cartels meant exclusively for exports have been excluded from the provisions relating to Anti-competitive Agreements. Section 3, sub section (5), clause (ii) of the Act states:
10. "Nothing contained in this section shall restrict - (ii) the right of any person to export goods from India to the extent to which the agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export."
11. Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, 124 S. Ct. (2004) at 879.
12. Mark Jephcott, HORIZONTAL AGREEMENTS AND EU COMPETITION LAW, Oxford University Press, New York, 2005, at p.4-5
13. Competition authorities indicate that they are empowered only to catch under express collusion. A finding of express collusion is bases only upon whether there is evidence to show that the parties have communicated directly with each other. Express collusion is per se unlawful.
14. Tacit collusion is a market conduct that enables firms to obtain Supra-normal profits, where "normal" profits correspond to the equilibrium situation. Tacit collusion can arise when firms interact repeatedly. They may then be able to maintain higher prices by tacitly agreeing that any deviation from the collusive path would trigger some retaliation. For details see John Black, Oxford Dictionary of Economics, Oxford University Press, New Delhi, Second Edition, 2002, at p. 193-194.
15. *www.oecd.org/dataoecd/57/32/1897960.doc,* retrieved on 28th May, 14.
16. The modelling of economic decisions by games whose outcome depends on the decisions taken by two or more agents, each having to make decisions without information on what

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choices the others are making. Game theory distinguishes between one-off games and repeated games, where reputation established through earlier games affects the conduct of subsequent ones. Game theory is widely used in analyzing both industrial organization and economic policy.

17. See John Black, Oxford Dictionary of Economics, Oxford University Press, New Delhi, Second Edition, 2002, at p. 368

18. It will also depend upon the likelihood that such deviations will ever be detected and the rapidity and severity of the punishment that the other cartelists are willing and able to impose on the cheating firm.

19. See the 1998 OECD report, Recommendation of the council concerning effective action against hard core cartels) (*www.oecd.org*), and the ICN SG1 report defining hard core cartel conduct.

20. Section 3, Competition Act, 2002.

21. *http://www.competition-commission-india.nic.in/advocacy/CARTELS.PDF,* last accessed on 10th June, 2014.

22. G.R.Bhatia, "Combating Cartel in Markets – Issues and Challenges", Competition Law Reports, 2008, *http://www.luthra.com/admin/article_images/DOC033.pdf,* last accessed on 10th June, 2014.

23. Amitabh Kumar, "Competition Law at a Glance", Vol.1, Part 1, Competition Law Reports, Manupatra, January, 2008, Available at *www.luthra.com/admin/article_images/DOC033.pdf,* last accessed on 10th June, 2014.

24. Id.

25. Section 19 empowers the Commission to start an investigation on the basis of a reference from the Central Government or the State Government or a statutory authority or on its own knowledge or information.

26. "Competition law in India, Jurisprudential trends and the way forward", Nishith Desai Associates, April 2013.

27. Anti-competitive activities, including cartels, taking place outside India but having effect on competition in India would fall within the ambit of the Act and can be inquired into by the Commission. The Act thus has extra territorial reach (section 32).

28. Id.

29. Section 46 Competition Act, 2002.

30. The Competition Commission of India (Lesser Penalty) Regulations, 2009 (No. 4 of 2009), available at *http://www.cci.gov.in/images/media/Regulations/regu_lesser.pdf,* last accessed on 10th June, 2014.

31. S. 53 A Competition Act, 2002.

32. Supra 32.

33. Joseph E. Harrington, Jr., "Detecting Cartels", Johns Hopkins University, 2005, available at *http://krieger2.jhu.edu/economics/wp-content/uploads/pdf/papers/wp526harrington.pdf,* last accessed on 10th June, 2014.

34. See Indian Cement Cartel case; "Graham Hind, "English Cutlers 'Hit by Cartel'," The Times (London), August 21, 1994; cited in Levenstein, Suslow, and Oswald (2004).

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35. William E. Kovacic and Ors., "Plus factor and agreement in anti-trust laws", available at *https://faculty.fuqua.duke.edu/~marx/bio/papers/plusfactors.pdf,* last accessed on 10th June, 2014.

36. Id.; Andrew I. Gavil *et. al.,* ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY, 267–68 (2nd ed., Thomson West, 2008).

37. For e.g. see the Tyre cartel case(2012) and the Cement Cartel case(2013) of India.

38. Richard A Posner, Antitrust Law 55–93 (2d ed., Chicago, 2001) (collecting and analyzing plus factors).

39. Abir Roy & Nishchal Joshipura, "Cartels in India", Competition Law Insight, 2010, *http://www.nishithdesai.com/Media_Article/2010/Cartels%20in%20India.pdf,* last accessed on 10th June, 2014.

40. Agreements and Concerted Practices, Office of Fair Trading", Competition Law 2004, *http://www.oft.gov.uk/shared_oft/business_leaflets/ca98_guidelines/oft401.pdf, last accessed on 10th June, 2014.*

41. "Price elasticity of demand is defined as the measure of responsiveness in the quantity demanded for a commodity as a result of a change in price of the same commodity." Richard G.Lipsey & Colin Harbury, PRINCIPLES OF ECONOMICS, 2nd Ed., Oxford University Press, New Delhi, p.62.

42. (order dated 24.8.1984 in RTP Enquiry No.10/1982), (order dated 13.12.1989 in RTP Enquiry No.13.13.1987, Rohtak Public Goods Motor Union (order dated 25.8.1984 in RTP Enquiry No.250/10983

43. FICCI Multiplex Association of India v United Producers/Distributors Forum and Ors, (1 of 2009) decided on 25th May 2012.

44. Reliance Big Entertainment, UTV, Eros International and FICCI Multiplex Association

45. United Producers/Distributors Forum (UPDF), The Association of Motion Pictures and TV Programme Produc¬ers (AMPTPP) and the Film and Television Producers Gild of India Ltd. (FTPGI)

46. *http://articles.economictimes.indiatimes.com/2012-02-27/news/31104297_1_hindi-films-cci-producers.*

47. In Re: Suo moto case against LPG Cylinder Manufacturers, case no 3/2011, *http://www.cci.gov.in/May2011/OrderOfCommission/LPGMainfeb2.pdf,* accessed on 10th June,14.

48. Id.

49. Case No 29/2010, Builders' Association of India v. Cement Manufacturers' Association & Ors, order dated 20 June 2012.

50. *http://www.epw.in/system/files/pdf/2012_47/35/Cartels_and_the_Competition_Commission.pdf,* retrieved on 10th June, 2014.

51. The maximum fine was imposed on jaiprakash Associates at Rs. 1,323.6 crores followed by Aditya Birla Group's Ultratech Cements (Rs. 1175.49 Crores), Ambuja Cements(1,1163.91 crores And ACC(1147.59 crores), Other companies found guilty are Grasim cements now merged with Ultratech, lafarge India, JK Cement, India Cements, Madras Cements, Century Tex-

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tiles and Benani Cements. The fine was fixed at 50% of their profit during 2009-11. The industry Body Cements Association (CMA) has also been fined Rs. 73 lakhs. They have directed to deposit the penalty within 90 days. (RTPE-52/2006, in re: Alleged Cartelisation by Cement Manufacturers, order dated 30 July 2012).

52. Scott D. Hammond, Deputy Assistant Att'y Gen. for Criminal Enforcement, Antitrust Div., U.S. Dep't of Justice,

53. The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades 1 (Feb. 25, 2010) cited in Gregory C. Shaffer, Nathaniel H. Nesbitt, and Spencer Weber Waller, "Criminalizing Cartels: A Global Trend? Available at *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2288871* last accessed on 10th June, 2014.

54. Id.

55. Id.

56. Caron Beaton-Wells and Christine Parker, "Justifying criminal sanctions for cartel conduct: a hard case" Journal of Antitrust Enforcement, (2012), pp. 1–22, available at *http://antitrust.oxfordjournals.org/content/early/ 2012/12/21/jaenfo.jns009.full.pdf+html,* last accessed on 10th June, 2014.

57. K. J. Cseres, Katalin J. Cseres, Maarten-Pieter Schinkel, Floris O. W., CRIMINALIZATION OF COMPETITION LAW ENFORCEMENT: ECONOMIC AND LEGAL, available at *http://books.google.co.in/books?id=qgrowwh 5APgC&printsec=frontcover#v=onepage&q&f=false,* last accessed on 10th June, 2014

58. Section 46 Competition Act, 2002.

59. See Cement Manufacturers Association case (Price parallelism was used as a major evidence for proving collusion). Also see Tyre Dealers Federation case (for Plus factors).

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CASTE MOBILITY AND PROTECTIVE DISCRIMINATION IN INDIA: *An Evaluation of The Judicial Responses and State Practices* (An Inter-Disciplinary Approach)

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(Date of Receipt :06-08-2014; Date of Acceptance for Publication : 08-01-2015)

Abstract

Justice J. L. Kapur, an eminent Judge of the Supreme Court, in his dissenting opinion in a landmark judgment namely; V.V. Giri v. D. Suri Dora (AIR 1959 SC 318) had observed that a person is free to choose his Caste and can move from Caste to another. In the instant case, Justice Kapur had held that the respondent- D.Suri Dora, who was a member of Scheduled tribe, by his own volition and conduct had rightly moved upward in Caste hierarchy and became a Khastriya from Scheduled Tribe. He gave his finding on the basis of the principles of Hinduism propounded in **Gita, Bhagwat Purana and Mahabharat** as well as the **"freedom of conscience"** enshrined in Clause(1) of Article 25 of our Constitution and that Caste is not based on birth rather on Karma.

Key Words : Caste mobility, **freedom of conscience,** evil of caste system.

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INTRODUCTION

During the period I was doing LL.M. in the Lucknow University, I had an occasion to go through the Supreme Court judgment of V.V. Giri, v. D. Suri Dora wherein I was deeply impressed and fascinated by the dissenting opinion of Justice J.L. Kapur, who held that caste mobility was permissible under Hindu caste system, which I felt was a perfect decision and had it been a majority decision, I firmly believe that the evil of caste system must been diluted considerably if not completely removed and it would have been a step towards achieving of National Goal of Casteless Society. Initially I was attracted towards the judgment in view of the fact that the appellant in the case was Dr. V.V. Giri, the former President of India, who had contested the case in election petition. The issue before the Court was whether a person of a particular caste by his own act can move to another or higher caste? Justice Kapur dealt the question at length and replied in affirmative. He based his opinion on the prepositions laid down in Bhagwat Gita and philosophy of Hindu religion.

The facts of the case, before Justice Ka-

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pur was that one Mr. Dippala Suri Dora had filed his nomination papers for the Parliamentary election from two seats one reserved for the Scheduled Castes and Schedule Tribes and other a general seat in double member constituency. During the early days of our elections, there used to be double member constituency- one reserved for the SCs/STs and other was open for general candidates. Since Mr. Suri Dora was a Scheduled Tribe and had filed his nomination paper for the general seats also claiming himself as a Kshatriya apart from filing nomination from the reserved seat, hence his nomination for the reserved seat was challenged on the ground he no-longer remained a Scheduled Tribe, because by his conduct he had moved upward in caste hierarchy. Mr. Suri Dora claimed himself a Khsatriya saying that although he was born in a Scheduled Tribe Caste, but by his conduct on his volition he became a Kshatriya and the Kshatriya Community had accepted him as a member of their caste. Justice Kapur observed that *"caste was nothing but division of labour. There is high authority to support the view that in Hinduism Caste was dependent upon actions and not on birth."* Quoting Bhagwat Purana, as *"one becomes a Brahmana by his deeds and not by his family or birth; even a Chandala is a Brahmana, if he is of pure character."* Justice Kapur also quoted **Chanodgya Upanishad** in which he said that Satyakam, a shudra, had raised himself to the position of Brahmana because he spoke the truth. *"Thus it was his character and not his birth, which determined his caste. Almost the Hindus may have raised themselves to the position of Brahmana by their good qualities and one such instance is of Sagar Malanga who was a Chandala. Vishwa Mitra was a Kshatriya and become a Brahmana, Hinduism might have became static at one stage, but its modern history shows that this is not so now and it would not be wrong to say that caste in Hinduism is not dependent upon birth by on action. The whole theory of Karma is destructive of the claim of caste being dependent upon birth."*

This observation of Justice Kapur has made it clear that one is at liberty to move upward in caste hierarchy. Thus, a lower caste member can very well claim himself to be a member of higher caste. If this practice is adopted and accepted by the society then there is no doubt that, the evil of Caste System shall wither away, thus leading to our goal of attaining casteless society. However, in doing so, reservation is a big hurdle, which would not permit for caste mobility. If a person of reserved category raises himself to upper caste, then he shall loose the benefit of reservation in educational matters, public employment, election to constitutional and statutory institutions and other governmental privileges and facilities etc. accorded to this group in the field of government contracts, loans etc.

Thus despite the fact that neither the Constitution nor the law nor Hindu mythology forbids a person to move from one caste to another particularly upward mobility and gives liberty to switch over to any caste of his choice, a person belonging to the Scheduled Caste or the Scheduled Tribe or Backward Caste does not move forward, because in doing so, for the reasons stated above. The fact remains that despite getting governmental privileges, generally those belonging to reserved categories feel shy of identifying them-

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selves as belonging to such group and express themselves as a member of forward communities particularly after availing of the facilities of protective discrimination in all walks of life right from education to public employment and constitutional institutions like Parliament, State Legislatures etc. and government grants, lease, loans, contracts. The members of the reserved category aspire for upward mobility, but on account of losing the protective discrimination they would not do so. However, with a view to raise their status in the society without losing anything, they are now adopting the way of life like that of the upper caste people and affixing caste name/surnames as Singh, Sharma, Rao, Prasad, Kumar, Chandra, Bharti etc.

Thus in adopting this practice, they are on the one hand raising their status and on the other hand not losing the Governmental benefits. Despite this new practice adopted by the members of the reserved category, the fact remains that this practice does not go toward establishment of a casteless society. Since the reservation is available to the same set of persons of other religions e.g. Sikh, Jain, Buddha, Muslim, and Christian, the caste system instead being vanishing is seen more dominant day by day, thus polluting the society. Mahatma Gandhi was champion of cause of removed of untouchability by coining a name "**Harijan,**" for the untouchables and was also determined to abolish the stigma of caste system. During the Constituent Assembly debates, Pandit **Jawahar Lal Nehru** had emphasised.

"*The reservation produce a false sense of political relation a false sense of strength, and ultimately, thereof, they are not nearly so important as real educational, cultural and economic advance which gives, them in nor strength to face any difficulty or any opponent,*" he further exhorted:

"*Reservation instead of helping the party to be safeguarded or aided is likely actually turn against it ....and isolates it from the main current ...at the cost forfeiting that never sympathy and follow feeling with the majority.... It is not good from the point of view of majority either.*"

Be that as it may, despite all efforts to banish the caste system, it has raised its ugly face more than what it was when India won freedom from the British Yoke of Imperialism.

RESERVATION POLICY

The reservation provisions initiated under the enabling clauses of Article 15(4) and Article 16(4) of the Constitution of India, either in the educational matters or in public employment are not time bound. However, it would go on till adequate representation of the reserved class is achieved. Reservation in the both Houses of Parliament and the State Legislatures was initially for 10 years, but the same had been extended five time each for 10 years and now by means of Seventy-Ninth Amendment Act, 1999, it is for 60 years w.e.f. 26.01.1950. The 60 years period has also expired on 25.01.2011, which is in all likelihood to be extended for another 10 years. This phenomenon shall continue because of political compulsions irrespective of political party, which rules the Centre. This means the reservation shall go on resulting into perpetuation of caste system.

In the latest 5-member Constitution

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Bench comprising K.G. Balakrishnan C.J., Dr. Arijit Pasayat, C.K. Thakkar, Dalveer Bhandari and R.V. Raveendran JJ. in Ashok Kumar Thakur (supra), two major questions were raised by the Bench itself -(1) what is caste ?, (2) and Reservation-how long? Chief Justice Balakrishnan observed *"that Caste is often used interchangeably with 'Class' and called as the basic unit in social stratification."* He further observed, *"Caste has been used mean class hereditary or rigid status and hereditary occupation."* Pasayat and Thakkar JJ. quoted **Mahatma Gandhi** in para 289 as ***"the Caste System as we know is an anachronism. If must go if both Hinduism and India are to like and grow from day to day"***. The Hon'ble Judges in para 289 had rejected 'Caste' as the main criteria for defining the expression "socially and educationally backward classes" in Article 15(4) or for that matter the expression **"backward class"** in Article 16(4) of the Constitution. The Hon'ble Judges relied upon the observations of Justice D.A. Desai in the case of K.C. Vasanth Kumar v. State of Karnataka (supra). Pasayat and Thakkar JJ. observed:

"The poor have no caste. A person belonging higher caste should not be made to suffer for what his forfeitures had done several generations back". Chief Justice Balakrishnan, himself a Dalit, had to forcefully say that (para 156):

"If may even be that same Brahmins may be servants of members of a lower caste, or it may also be so that the personal servant a rich Brahmin may be a poor Brahmin. Hence there is every reason to believe that within a single Caste groups there are some classes or groups of people to when good fortune or perseverance has brought more dignity, social influence and social esteem than it has to others."

Criteria Of Backwardness

In **M.R. Balaji v.** State of Mysore , Justice **P.B. Gajendragadkar** (as the then was), who later was elevated as the Chief Justice of India, had held that caste cannot be said to be the sole or dominant criterion for identifying backwardness.

Later on ward in **R. Chitralekha v.** State of Mysore , Justice **Subba Rao** (as he then was), who later because the Chief Justice of the Supreme Court of India emphasized that under no circumstances a 'class' could be meant as **'Caste'**, although caste may be taken as one of the factor. He was also of the view that **'caste'** factor may also be excluded, if the identification of backwardness could be done event without it. However, this secular trend shifted in 1968, the Supreme Court in P. Rajendran v. State of Madras, Chief Justice K.N. Wanchoo, on behalf of the Court laid emphasis on 'Caste' factor by saying that 'a caste is also a class' and if a caste as a whole is backward, the reservation may be made in favour of that caste. The Supreme Court followed the same trend in State of A.P. v. P. Sagar.

In Triloki Nath v. State of J & K, the Constitution Bench almost endorsed the view of P. Rajendran and P. Sagar. The principle was followed in A. Peeriakaruppan v. State of Tamil Nadu and State of A.P. v. U.S.V Balram . Somewhat the same view was echoed in 1996 in K.S. Jayasree v. Kerala. In this case what was in question was a Government Order specifying that only citizens who were members of families which had an aggregate income of less than Rs. 6,000 per annum and which belonged to the caste and community mentioned in the annexures to the Gov-

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ernment Order would constitute socially and educationally backward classes for the purposes of Art. 15(4). The Court upheld the order and held for ascertaining social backwardness it may not be irrelevant to consider the caste. The Court also observed that caste cannot be made the sole or dominant test. It said that social backwardness is in the ultimate analysis the result of poverty to a large extent. Social backwardness which results from poverty is likely to be aggravated by considerations of their caste. However, in 1985, the Supreme Court in the case Vasantha Kumar , Caste was held to be dominant factor and this view was finally upheld by 9-Member Constitution Bench in Indra Sawhney v. U.O.I . Thus, caste is the sole criteria for identifying backwardness.

Our legal and constitutional system does not recognize caste. It also mandates for creation of a casteless society. In this regard, **Prof. M.P. Jain** has rightly observed:

"Art. 16(2) expressly forbids discrimination on the basis of 'caste'. Scheduled Castes and Scheduled Tribes are not castes within the ordinary meaning of caste. These are backward human groups. There is a great divide between these persons and the rest of the community. As Scheduled Castes and Scheduled Tribes suffer from socio-economic backward status, the fundamental right of equality of opportunity justifies categorization of Scheduled Castes and Scheduled Tribes separately for the purpose of 'adequate representation' in the sate service."

The second question raised by the Bench was as Reservation **how long**?

Dr. Arijit Pasayat and C.K. Thakkar JJ. in Ashoka Kumar Thakur case had expressed their anxiety on the continuance of reservation and questioned as to how long shall it continue, because admittedly there was no deletion from the list of the OBCs. Instead of deletion, it was increasing. They observed:

" *the ultimate objective is to bring people to particular level so that there can be equality of opportunity ...If after nearly six decades the objectives have not been achieved, necessarily the need for its continuance warrants deliberations." (p. 550 para 281)"*

Bhandari J. observed as follows:

"The caste system is peculiar to this country. Perhaps the entire society has been divided on the basis of caste."(p. 681 para 545)

"I nevertheless believe that caste matters will continue to matter as long as we divide society along caste lines. Caste- based discrimination remains." (pp. 698-699 paras 605)

R.V. Raveendran J. in the same case (supra) was of the view :

"Caste has divided this Country for ages. It has hampered its growth. To have casteless society will be the realization of a noble dream."(p. 717 para 666)

The observations of the Constitution Bench are that **'Caste'** has divided the country. This shows that caste is anti-national.

Mr. Harish Salve, Senior Advocate, while arguing in the case of Ashok Kumar Thakur pleaded that *" in the last 14 years since the Mandal judgment NOT one single backward caste carried from the 31st Census has been excluded."* (Para 6.6.9)

Justice R.V. Raveendran emphasised that *"if reservation is continued, the country will become a caste divided society permanently."* (Supra at pp. 717 at para 666).

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The law regarding reservations in education and public employment have been made under the enabling clauses of Article 15(4) and 16(4) respectively, whereas the main clauses of both the Articles forbid discrimination on the ground of 'Caste' apart from other grounds. The later clauses enable the State to frame laws on the ground of **'Caste'**. The question is as to what extent, manner, and duration, reservation could be made in fevour of the reserved category? The Supreme Court in case of Devdasan T. v. State of Madras , held Articles 16(4) to be an exception to Article 16(1), meaning thereby that any reservation made in exercise of the powers conferred upon the State under Article 16(4) must be subject to the provisions of Clause (1) of Article 16(4) and further held that Article 16(4) is not a fundamental right of the reserved category, rather it authorizes the State to make reservation.

This trend continued for a long time and in subsequent cases, the Supreme Court had been relying upon the aforesaid judgment, but there appeared a slight shift in the stand in 1976 in the cast of State of Kerala v. N.M. Thomas , where the Supreme Court maintained a harmonious construction between Article 16(1) and Article 16(4) by saying that the latter is a facet of the former. However, the Apex Court took a U-turn from its stand taken in 1964 by over-ruling Devadasan case in Indra Sahwney case. Same becomes the position of Article 15(1) and Article 15(4). Perhaps it was not the intention of the Framers of the Constitution and the judgment of the Indra Sahwney case indicates that the intention of the Framers of the Constitution was not brought to the notice of the Apex Court. Thus, Articles 15(1) and 16(1) become redundant so far as Articles 15(4) and 16(4) respectively are concerned.

In Thomas case the Coram was Ray C.J., Mathew, Beg, Krishna Iyer and Fazal Ali JJ. (majority) and Khanna and Gupta JJ. (dissenting)

Per majority, Article 16(1) permitted reasonable classification and did not forbid the State from rendering social justice to the backward classes. Its opinion was rested on the premise that the impugned exemption had been granted only for a temporary period. Ray C.J. stated categorically that Article 14, 15 and 16 from part of string of constitutionally guaranteed rights supplementing each other. Krishna Iyer J. dissenting said that only Harijans should be allowed or permitted preferential treatment on the basis of reasonable classification ... so that casteism does not come back from the backdoor.

Justice Krishna Iyer emphasised that recruitment in a particular year should be not be basis, rather on total strength in a service cadre.

In this case, the Supreme Court further said:

"A word of sociological caution. In the light of experience, here and elsewhere, the danger of 'reservation', it seems to me, is three-fold. Its benefits, by and large, are snatched away by the top creamy layer of the 'backward' caste or class, thus keeping the weakest among the week always weak and leaving the fortunate layers to consume the whole cake. Secondly, this claim is over played extravagantly in democracy by large and vocal groups whole burden of backwardness has been substantially lightened by the march of time and measures of better education and more opportunities of employment, but wish to weak the **'weaker section'** *label*

as a means to score over their near-equals formally categorized as the upper brackets."

In Devdasan majority (4:1) held that Article 16(4) was prior a exception to 16(1), thus it should not be interpreted so as to nullify or destroy the main provision, as otherwise it would in effect render the guarantee of equality of opportunity in the matter of employment under Article 16(1) wholly illusory and meaningless. However, **Subba Rao J**. (as he then was), who subsequently became the Chief Justice of India, in his dissenting opinion had expressed the opinion that Article 16(4) was not an exception to Article 16(1).

Even without Article 16(4), the State could have classified 'backward class of citizens' in a separate category for special treatment in the nature of reservation of post/ appointments in government services Article 16(4) merely put the matter beyond any shadow of doubt in specific terms.

The Supreme Court in Akhil Bhartiya Shoshit Karmachari Sangh (Rly) case said that Article 16(4) is not an exception to Article 16(1) but only an instance of classification implicit and permitted by Article 16(1). The Supreme Court held:

"The success of state action under Article 16(4) consists in the speed with which result oriented reservation withers away as no longer a need, not in the ever widening and everlasting operation of an exception [Article 16(4)] as if it were a super-fundamental right to continue all the time. To lend immortality to the reservation policy is to defeat its raison d'être; to politicize this provision for communal support and party ends is to subvert the solemn undertaking of Art. 16(1), to casteify 'reservation' even beyond the dismal group of backward most people, euphemistically described as scheduled castes and scheduled tribes, is to run a grave constitutional risk. Caste, ipso facto, is not class in a secular State."

Dr. G.S. Ghurye says – *"we are marching towards caste polarization instead of a casteless society."*

SUPREME COURT ON RESERVATION

Prof. Mahendra P. Singh says that: *"The Mandal Commission case is a long and constructive commentary on Articles 15(4) and 16(4) which resolve many contentious issues though it opens a few new ones also."* Prof. Singh refers to Marc Galenter – Competing Equalities (1984): Parmanand Singh – Equality, Reservation and Discrimination in India (1985); Some Crucial Problems of Tension between Equality and Compensatory Discrimination in his work namely, M.P. Singh(Ed) Completive Constitutional Law (1989) p. 356.

Mr. Fali S. Nariman, the renowned Advocate pleaded that OBC candidates have secured position under their quota as well as under the open category also. They have secured at least 9 per cent on open category on the strength of their merit, which shows to establish that they are no longer backward in the sense they were considered to be prior to enforcement of preferential treatment. Mr. Nariman's data relates to decade back. By now their presence under open category is far more. He also informed the Court that the OBCs are not educationally backward and Reservation for educationally advanced In Tamil Nadu, there is reservation of seats for 69% of seat.

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However, the data supplied by the Additional Secretary to the Government of India in the Ministry of Welfare before the Supreme Court on 30.10.1990 in his affidavit, as quoted by Prof. Anirudh Prasad , regarding the representation of SCs/STs and OBC's in 30 Ministries and Departments and 31 attached Offices and Public Sector Undertakings as follows:-

Categories of	Total No. of	Percentage of	Percentage of
employees		SC/ST	OBCs
All classes	15,71,638	18.72%	12.55%

Under Sec. 3 of the U.P. Public Services **(Reservation for Scheduled Castes, Scheduled tribes and Other Backward Classes)** Act, 1994, the quota is as follows:-

Schedule Caste	**21%**
Scheduled Tribes	**2%**
Other Backward Class	**27%**
	50%

In Central Government, the reservations in appointment are as follows:-

(a) In Direct Recruitment on All India basis open competition –

Schedule Caste	**15%**
Scheduled Tribes	**7.5%**
Other Backward Class	**27%**

(b) In Organizations receiving candidates from a single common All India List prepared by SSC

Schedule Caste	**15%**
Scheduled Tribes	**7.5%**
Other Backward Class	**27%**

(c) Direct recruitment of All India basis otherwise than by open competition

Schedule Caste	**16.66%**
Scheduled Tribes	**7.5%**
Other Backward Class	**27%**

Exemptions – Scientific/technical posts for conducting organizing, guiding, and directing research which are above the lowest groups 'A' one are exempted from the purview of reservation vide Office Memorandum dated 13.05.1994 issued by the **(Ministry of Personnel Public Grievances & Pensions) (Department of Personnel Training)**, Government of India.

This figure is apart from the appointments/ selections of SCs and STs made in open category on the basis of their merit. Here it may also be mentioned that in terms of Indira Sawhney Case, there is no reservation in Defence services, higher technical posts, University Professors, Super-Specialties etc. as enumerated in para 839 of the judgment.

Further there is also no reservation for the posts of the Judges of the Supreme Court, High Courts, Central Government and State Governments Tribunals, Judicial Commissions, other constitutional authorities like Chief Vigilance Commissioner, Chief Election Commissioner, Members of the Planning Commission, Finance Commission, Chairman, U.P.S.C and Members of such Commissions, State P.S.Cs. Boards of Revenue, etc. Further, same is position in respect of single isolated posts like the posts of Chief of a Government Department like Cabinet Secretary, Chief Secretary, and Heads of the Departments like D.G. Police, D.G. Health etc. and Vice-Chancellors, Principals etc. Hence as per the data referred to above, where SC representation in Group 'A' is 11.1%, thus there is short fall of 4.9%, but if we exclude those posts where the rule of reservation does not apply which comes to around 2%, the shortfall comes down to 2.9%. Further, the

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data is 01.01.2011. It may be reasonably presumed that in further one year, the shortfall would come down Considerably and the shortfall would be negligible. So far as the position in Group 'B', 'C' & 'D' are concerned, it is almost full. In Group 'B' it was 14.3% as on 01.01.2011 and by now it must have reached its required quota. In Group 'C' it was 16% and Group 'D' it was 19.3% so the required quota is full in B, C & D categories. Same is the position STs, where reservation is 7.5%. If we consider the data furnished by Mr. Fali. S. Nariman in Ashok Kumar Thakur's case above the picture becomes move clear this point.

THE MANDAL COMMISSION

The Mandal Commission has identified, as stated earlier 3743 in 1980 castes as Backward all over India. Earlier in 1955, **Kaka Kalelkar Commission** had identified 2399 castes Thus during a period of 25 years it has gone up from 2399 to 3743 i.e. increase of 344 castes all over India. Same is position of U.P. where the number has gone up from 49 to 76. In 2011 the number further swelled to 76 castes. Thus, it is evident that not a single caste has been excluded, rather it has been added.

Therefore, caste is to stay in Indian social and political system for all time to come and there appears no ray of hope of achieving a **"Casteless"** society as promised and aspired in our Constitution. The question is as to how to achieve out National goal? Whether Justice J.L. Kapur's view in Suri Dora Case would find a way out and whether to abolish caste itself by granting statutory right of caste mobility by enacting a Law by Parliament, or remove caste columns from all official documents – Central Government, State Government, Public Sector Undertaking, Statutory authorities, local bodies, educational institutions etc? Whether reservation on all other grounds except 'Caste' can be a means? Whether Presidential reference under Article 143 to the Supreme Court on the question of caste mobility would be an answer? These are the issues, which require investigation. Thus, this task has been undertaken. Now the question arises as to whether we have reached the goal of establishing a society based on equality through reservation?

CASTE SYSTEM NOT RIGID IN VEDIC PERIOD

Caste is usually considered as the cornerstone of the Hindu religion. Whether it is the foundation of Hinduism or not may be a subject matter of controversy, but it cannot be denied that Caste exists in Hindu religion and it is a prime factor. It not exist in Hindu community rather it has also become an integral part of other communities of India like Jain, Buddhist, Muslims, Sikh and Christian. Thus, it is necessary to understand the concept, origin and evolution of Caste. It has to be understood that not only in the religious perspective, rather from the oriental, historical, sociological and legal and Constitutional perspectives. When we talk of Caste, then the discussion about untouchability also become inevitable. Whether Caste is good or bad is another subject matter of controversy, but it is not disputed that untouchability is an ugly facet of Hinduism-a stigma on our society.

Under the oriental concept, there is no Caste, it is Class namely Varna, whose foundation was profession. In **Mahab-**

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harata, it is proclaimed:

जन्मना जायते षूद्रः संस्कारैर्द्विज।
वेदपठद भावेद विप्रो,
ब्राह्म जनातीति ब्राह्मनाह ।। [21]

Accordingly every person was born in the lowest class i.e. Shudra, but by training, education and inculcation of culture, he moves to a higher status. **Lord Krishna** says-

"Birth is not the cause, my friend; it is virtues which are the cause of auspiciousness. Even a Chandala observing the vow is considered a Brahman by the gods."

Paradoxical as it may seem, the system of Varna was the outcome of tolerance and trust. Though it may now have degenerated into an instrument of oppression and intolerance and it tends to perpetuate inequality and develop the spirit of exclusiveness, these unfortunate effects were not the central motives of the Varna system. The system of Varna insisted that the law of social life should not be cold and cruel competition, but harmony and co-operation

na yonir napi samskaro na srutam na ca santatih karanani dvijatvasya vrttam eva tu karanam

"Neither birth, purificatory ceremonies, nor learning, nor progeny are qualifications for brahminical status. Only brahminical conduct is the basis for brahminical status."

According to **Swamy Vivekanand:** ***"The ideal man of our ancestors was the Brahmin. If caste is thus unavoidable, I would rather have a caste of purity and culture and self-sacrifice, than a caste of dollars."***

"A Sudra is not a Sudra by birth alone-nor is a Brahmana by birth alone. One attains rank of a Brahmin by virtue of his ripe wisdom and saintly character. ..."

".. These distinctions exist and have existed from time immemorial, and are based upon natural divisions. Caste is present in the East and class is present in the West."

We have examples how great Sages, **Vyasa**, was the son of **Satyavati**, ***a low caste woman.*** Valmiki, was a low caste hunter. Aitareya, who wrote the Aitareya **Upanishad,** was born of a Shudra woman. **Parashar**, the famous law-giver was the son of a Chandala, **Vasishta** was the son of a prostitute, **Vidura**, was born to a low caste woman.The **Kauravas and Pandavas** were the descendants of Satyavati, a low caste fisher-woman and became Kshatriyas on the basis of their occupation. **Kabir, Sura Dasa, Ram Dasa** and **Tukaram** the Shudras, were elevated as Brahmins.

We have also examples how out of two sons **Shanatanu and Devapi** of a King, one became Brahmin and other as Khsatriya. Thus, Caste mobility was a way of life during those days. However, in post-Aryan invasion era, when Aryans inter-mixed with Dravidians extended matrimonial relation with them. Due to endogamy Caste became rigid and subsequently and became hereditary and Shudra became untouchables, who were treated as out-castes and were subjected to all sorts of exploitation and oppression.

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This was the stage when untouchability became a stigma upon Hindu society. Originally there were four classes; namely **(1)** Priestly class i.e. Brahmins, **(2)** Ruling class i.e. Kshatriya, **(3)** Merchant class i.e. Vaishya and **(4)** Artisan and menial class i.e. Shudra.

ORIGIN OF CASTE

According to **Rig Veda**, God created the four classes and it stood in relation to social organization in the same relation as the different organs of the primordial Man to his body. Sir R.P. Masani says that all the four classes' work together to give vitality to the body politic. There is nothing to show that the order in which the four classes were mentioned marked their social status. Ambedkar says that Caste is an institution that **'pretends tremendous consequences'**. According to **Dr. S.V. Ketkar,** prohibition of inter-marriage and membership of Endogamy are the two characteristics of Caste, but **Dr. Ambedkar** says that prohibition of inter-marriage is the only characteristic of the Caste and the other characteristic is the result of the first characteristic. Thus, endogamy is the only characteristic of Caste, although in the primitive society, the custom of exogamy existed, which fade away by the efflux of time. Dr. Ambedkar is of the view that superimposition of endogamy creates the Caste. There is common belief that it was Manu, the ancient law-giver by means of his Manusmriti, had created the Caste; **Dr. Ambedkar** had rightly demolished this theory. He says *'it is unimaginable that the law of Caste was given …….. It is hardly an exaggeration to say that Manu could not have outlived his law… Manu did not give the law of Caste and that he could not do so. Caste existed long before Manu. He was an upholder of it and therefore philosophized about it, but certainly, he did not and could not ordain the present order of Hindu society. His work ended up with the codification of existing Caste rules and the preaching of Caste Dharma'*. **Dr. Ambedkar** rightly demolished the unfounded belief that it was Brahmin, who had created the Caste. According to him the basis of Caste is Endogamy, because Caste the creation of superimposition of Endogamy. *'The Brahmins may have been guilty of many things and I dare say they were, but the imposition of Caste system on the non-Brahmin population, was beyond their matter'*, says **Dr. Ambedkar**. He also dispelled the idea that the Caste is creatures of Shastras or religious preaching or religious sanctions. He was of the view that preaching can neither make nor unmake Caste. He also rightly rejected the theory propounded by the noted western Ethnologists Arnold Mathew, Sir Denzil Ibbetson, J.C. Nesfield, Senart, Sir Risley, Herbert Spencer etc. that the basis of Caste is **(i)** occupation, **(ii)** survival of tribal organization, **(iii)** rise of new belief and **(iv)** cross breeding, because if these factors could have been the basis of Castes, then Caste would have existed all over the World. Hence, the emphasis is the system of Endogamy, which was prevalent only in Hindu society – ***a unique feature of Hindu community***. He also firmly rejected the theory of **Herbert Spencer** that Caste is in the obedience of **'law of disintegration'.** In Spencer's formula of evolution or as the structural differentiation with an organization or as being consciously imposed on helpless and humble population.

" As regards the belief that the Brahmins had created the Caste, ***Dr. Ambedkar*** *argues against this belief that initially Brahmins adopted the system of Endogamy or closed-door system',*

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which were imitated by all the non-Brahmin sub-divisions or classes, who in their turn became endogamous Castes. Hence, Brahmins cannot be blamed for the creation of Caste system. Finally Ambedkar points out ' **(a)** *that in spite of the composite make-ups of the Hindu population, there is a deep cultural unity ,* **(b)** *the Caste is a parcelling into bits of a larger cultural units,* **(c)** *that there was one Caste to start with and* **(d)** *the classes have become Castes through imitation and ex-communication."* His finding is that characteristics of Caste are prohibition.

Prof. N.K. Dutt believes that Varna system was created by the Aryan conquerors in India and the Caste system was because of influence of aboriginals.

Caste exists in Christian community also. Even Christian converts also began to call themselves as Chamar Christian and Dhobi Christian etc. **Dr. Ambedkar** wrote in 1938: *"Caste governs the life of Christians as much as it does the life of the Hindus. There are Brahmin Christians and non-Brahmin Christians. Among non-Brahmin Christians there are Maratha Christians, Mahar Christians, Mang Christians, and Bhangi Christians. Similarly, in the south there are Pariah Christians, Malla Christians, and Madiga Christians. They would not intermarry. They would not inter-dine."* Thus, Caste system also emerged into Christianism, where there is no concept of Caste. Indian Christians also are not free of caste. Goans and East Indian Christians, still refer to themselves as Bamons (Brahmins), Bhandaris, Kolis, Prabhus, etc.

Changing Scenario in Post-Constitutional Era

Same was the way in **Sikh religion**. There also we find Castes like Jat Sikhs, Mazahabi Sikhs, Ramgarhiya Sikhs, etc. which is contrary to the Sikh faith. The most surprising aspect of this trend, which emerged after the Policy of reservation was introduced by our Parliament, even Buddhist converts also began to claim themselves as Dalit Buddhists, despite the fact that in Buddhism, there exists no Caste. This is also reinforced by the fact that the Parliament by amending the Constitution (Scheduled Castes) Order, 1950 by means of an Amending Act No. 63 in the year 1956 w.e.f. 30.5.1987 included Sikhs and in 1990 including Buddhist in the definition of Scheduled Castes by further amending the Constitution (Scheduled Castes) Order, 1950 by means of Amending Act No. 15 of 1990. The amended provision of Sec. 3 of the Constitution (Scheduled Castes) Order, 1950 reads as under:-

"Notwithstanding anything contained in paragraph 2, no person who professes a religion different from the Hindu, the Sikh or the Buddhist religion shall be deemed to be a member of a Scheduled Caste."

The Caste system in Islam is also in contradiction of Islamic faith, because Islam is based on brotherhood. It is also against slavery, because in the system of brotherhood, there can be no room for slavery, thus there cannot exist Caste, but in India, we see Caste system in Muslims also we find practice of untouchability there also. Similarly, those who had converted to Islam, the religion which does not recognize Caste and where no Caste exists, created all such Castes which exists in Hinduism with different names or the same names like Ghosi, Darzi, Julaha. The upper caste converts also got their different Caste names.

Buddhism is an atheist religion, which does not believe in God, thus, there cannot be any Caste. In fact, **Lord Buddha**

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had led a crusade against the evils prevalent in Hinduism including worshipping of thousands of Gods, Caste system etc. He denounced God and established his new religion namely Buddhism, which did not recognize God and Caste, but strangely the followers of Buddhism themselves created Lord Buddha as God. Detlef Kantowasky, a German Professor of Sociology in his recent book **`Buddhisten in Indien heute`** says that Mahars who converted into Buddhism are still not able to shake off their untouchable stigma.' The same contradiction we find in Lingayat community. Saint Basaweshwara, the great Saint, social and religious reformer and propounder of the Lingayat movement, which was very successful in Karnataka, Andhra and Maharashtra region, had basically created revolution to banish the Caste system, Brahmanism- though he was himself a Brahmin- and rituals under Panchsutaks, his followers- Lingayats themselves created Lingayat as a Caste- that too a backward Caste. This trend is undoubtedly only to secure the benefits of reservation, despite the fact initially increased economic mobility led to increased social mobility, but unfortunately, the progressive trend came into reverse gear only due to reservation. *"Over the years, when Dalits converted to Islam, Sikhism or Christianity, they did not lose their Dalit identify. They remained primarily Dalits, and, then Christians or Sikhs. Conversion is not the answer to exploitation of Dalits."*

The Supreme Court Bench comprising Chief Justice K.G. Balakrishnan (as he then was), Justice Arijit Pasayat, Justice C.K. Thakkar, Justice Dalveer Bhandari and Justice R.V. Raveendran defined Caste in one of the leading cases namely Ashoka Kumar Thakur case , in their own way in separate findings.

Chief Justice Balakrishnan (as he then was) in Ashoka Kumar case was of the view that 'Caste is often interchangeability was class and can be called as basic unit of social stratification. The most characteristic thing about a caste group is its autonomy in caste related matters. One of the universal codes enforced by all castes is the requirement of Endogamy. It is true that the basic characteristics of caste are Endogamy and hereditary. Although the practice of Endogamy was stated when the Aryan came here and the system became hereditary when the Moguls and British came, but after Independence, the scenario drastically changed.

Castes are often rated on a purity scale and not on a social scale. ...According to the early sociological theories, the term **'Caste'** has been used to mean **'Class'**, hereditary or rigid status and hereditary occupation... A class always enjoys certain privileges or certain advantages Chief justice Balakrishnan rejected the theory that there is inequality because of our Caste system; he had rightly observed that within a Caste also there exists inequality. He says that not all Brahmins are having the high social status. There may be a Brahmin caste servant of a lower caste. He does not believe that only physical or occupational characteristics are the basis of Caste, it is based on close-knit social control. He gives credit to the Caste system by saying that it forms a homogeneous unit based on common ancestry and common customs, usage and rituals. However, he remarks that *'social classes divide homogeneous populations into layers of prestige and esteem and the members of each layer are able to circulate freely within it..... a caste is a*

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horizontal division and a class, a vertical division..' Thus, **Chief Justice Balakrishnan** nowhere finds any fault in the present day caste system and exploitation or injustice against the depressed class in the Independent India.

Prof. Ramesh Chandra says that Dalit or oppressed class is found everywhere in the World. In India, it is known as Caste, but in Europe and America, Dalit are known by their economic and social (racial) status in society. In fact, untouchability is a special feature of slavery, which was prevalent in the whole World during the feudal and imperialist period of history. However, with the advent of democracy, it has lost its existence.

The above discussion makes it clear that Caste is not the foundation of Hindu religion. The edifice of Hinduism shall remain intact even without the caste system.

STRUGGLE FOR ESTABLISHMENT OF CASTELESS SOCIETY DURING FREEDOM MOVEMENT

The Nationalist Freedom movement was started by great freedom fighters, but since the freedom fighters were of elite class, highly educated from England and other foreign Countries and thus were from the upper castes, the British Imperialist initiated a policy of divide and rule and with this view, they divided upper caste Hindus from the oppressed class Hindus. The work of the missionaries came very useful to the British rulers and with this view in mind, they also stated welfare policies for the Untouchable like providing free education and scholarships to the children of the Untouchables and reservation in admission, making laws for the removal of social disabilities that the Untouchables had been suffering from the old age history and other privileges, so as to attract them towards the British rule, which would in turn create repulsion from joining Freedom movement led by the high caste Hindu leaders. This policy, although initially was successful, but when Mahatma Gandhi emerged in the scene of Freedom movement, he created such a big impact of the movement that the movement which was otherwise limited to the elite class only became a mass movement in which people from all walk of life, including the Untouchables whole-heartedly joined sacrificing everything. However, despite all this, the converted untouchables remain as such and we find Dalit Christians, Dalit Muslims, Dalit Sikhs, and Dalit Buddhists. Authors Soma Wadhwa, S. Anand, Charubala Annuncio and Sutal Mukerjee in their work **'Dalit'** Conversion to Budhism, have to say as follows:

"Even if you convert, caste remains a reality." —*P. Ambedkar, Babasaheb's grandson*

However, dilemmas do plague decisions to convert. Dalits who turn to Islam or Christianity today risk losing the many privileges of reservations. Hence the appeal of Buddhism, since V.P. Singh ensured in 1990 that neo-Buddhists would not lose out on reservations. So why should a Dalit who has converted to another religion that doesn't believe in caste still enjoy caste-based reservations? Says **Prakash Ambedkar**, grandson of Babasaheb and an MP since 1990 from Akola, *"Because they hail from backward castes and are economically poor. Also, no matter what religion you adopt, your caste remains a reality." Spokespersons of the Hindu establishment would*

call this a case of having your cake and eating it too, while the converts would call this their inalienable economic right."

In South India, we find that the depressed class after attainment of higher economic and social status, they tried to get recognition of higher castes and for this they adopted Sanskrit culture by began to use Sanskrit names and surnames like Rao, Reddy, Balakrishnan, Swamy etc. in South India and Sigh, Sharma, Rai, Prasad, Bharati, Bhaskar etc. in North India. A slow movement of Caste mobility was visible during this period, when economically and educationally advanced untouchables claimed their descent from Sun and Moon by getting its approval from Brahmin priests and adopting, as said earlier by adopting Sanskrit culture, Sanskrit names, and Sanskrit surnames, they pretended to be Brahmins and Kshatriyas. The Nadar community of Madras region, who during the British period had grown by as a very powerful community economically and educationally because of the social reforms initiated by the British Government, began to claim themselves as Kshatriya. Much in the same way, the Boad untouchable community of Orissa, whose ancestral profession was trade of distillery suddenly became rich, because since the British Government implemented the policy of prohibition of sale and use of liquors, as such Boad would sell the liquors in black, which raised their income many-fold and on the basis of their higher economic status, they claimed themselves as Kshatriya.

There is no doubt that the policy of the colonial Government to divide and rule our country could not succeed, but this policy certainly resulted into retardation of process of Caste mobility amongst the Untouchables. Since the privileges were confined to the Untouchables only, hence those Untouchables, who had elevated themselves to higher status, had adopted Sanskritzed culture and claimed higher caste status, reverted back with a view the trend of Caste mobility was reversed and again they started claiming themselves as Untouchables.

No Place for Caste in Our Constitution

We do not find any reference regarding caste except scheduled caste. Even in Article 15 and 16 of the Constitution of India, in which reservation in the public employment and educational institutions, the reservation is not based on caste. In both the Articles we do not find the word caste, except the fact that where the Constitution guarantees that State shall not deny to any person on the basis of caste. This shows that the Constitution makers were aware of the caste system and its autonomous status, therefore no where caste was mentioned. However, the word **"Scheduled Caste"** for the first time was introduced in the Government of India Act, 1935.

As discussed earlier, Articles 15 and 16 of the Constitution very specifically denies recognition of caste. Clause (1) of Article 15 says that the State shall not discriminate against any citizen on grounds only of ... caste... Similarly, clause (2) of Article 16, which relates to public employment, the caste has no place. Clause (2) of Article 16 says that no citizen shall, on grounds only of ....caste..., be ineligible for, or discriminated against in respect of any employment or office under the state. Thus, we see that the caste has no rec-

ognition in our Constitution. Similarly, in not a single Central or State legislation all over India there is any provision, which would recognize caste except schedule caste. **Prof. M.P. Jain's** observation in this regard is very significant, which reads as under: *"Art. 16(2) expressly forbids discrimination on the basis of 'caste'. Scheduled Castes and Scheduled Tribes are not castes within the ordinary meaning of caste. These are backward human groups. There is a great divide between these persons and the rest of the community. As Scheduled Castes and Scheduled Tribes suffer from socio-economic backward status...."* The above discussions make it clear that Caste is not all any essential factor of our society- be it a Hindu society or Muslim, Sikh, Jain, Christian or Buddhist society. Caste has no legal sanction or status. Anybody is at liberty to assign himself to any caste of his choice and free to change his Caste at his will. Thus, Caste cannot be a criterion for reservation. Once Caste is taken out of the basic principle for reservation, the other relevant and essential factor for the determination of reservation becomes social, economic, and regional factors. The word **"Caste"** has not been defined anywhere either in our Constitution or any Central or State legislation. Even this word has not found place anywhere by way of reference in the Constitution or any enactment. The various categories of Caste e.g. Brahmin, Khsatriya, Vaishya, and Shudra have neither been defined nor referred to in our Constitutional nor in our legal system. So much so, the word **'Harijan',** i.e. people of God or sons of God, a word coined by **Mahatma Gandhi** for **"Shudras"** or **"depressed class"** does not find place in Constitution or any law.

One most significant example of a person being a Hindu, yet not belonging to any caste is a Sanyasi, who ceases to belong to his caste the moment he becomes a Sanyasi. He is required to renounce his caste, a condition precedent of becoming a Sanyasi. Thus if a Sanyasi can renounce his caste, then why a Grihashta cannot do the same? Is there any impediment in renouncing his caste- legal or otherwise? The answer is undoubtedly negative. Further, our religion does not restrain any one to change his Caste. We should remember what Swami Vivekanand had said on this issue. He said that if a group of people of any caste declare themselves that they are Brahmins, nobody can object to it.

Dr. Ambedkar has also pointed out a vital truth about European missionaries, who were working for the expansion of their religion in India by taking advantage of the pitiable condition of the depressed class , thus creating repulsion against Hinduism and attracting towards Christianity by rendering all sorts of missionary services , found that since immense hold of Brahmins over the bulk of Hindus including the Untouchables, hence it was essential for the missionaries to break the hold of Brahmins so as to make them successful for the expansion of Christianity , hence the British Imperialists formulated a policy of divide between the Brahmins and the Untouchables, thus the British Government conferred economic privileges upon the Untouchables. So that the Untouchables and other low caste members would look to the British Imperialists for their protection and revolt against the Brahmins and other upper castes. This policy was also formulated because during this period freedom movement was started which was mainly led by Brahmins, thus divide and rule policy between

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the Brahmins and the lower castes was conceived and initially it appeared to be successful, but it was a temporary phase and this policy flopped on account of the influence of Mahatma Gandhi, who associated the Untouchables with the National movement. Prior to associating them with the freedom movement, he led a struggle for removing oppression and exploitation of the Untouchables, giving a respectable position in the society, for the removal of untouchability, permitted them entry in the temples and other social upliftment measures and gave them a new name- **'Harijan'-** i.e. people of God or sons of God. This created a big impact on the freedom movement.

The main thrust of the concept of upward caste mobility was elaborated in the minority opinion in the case of Suri Dora. To achieve the cherished goal of establishing a casteless and classless society and remove social, economical educational backwardness, either remove the Caste by legislation or start Nation wise campaign for caste mobility in upward direction.

Justice D.A. Desai in the case of Vasanth Kumar case , which was relied upon in Ashoka Kumar case had strongly impressed upon to **'weaken and progressively eliminate caste system.'** He expressed his anxiety that instead of the caste bond being loosened, it is moving into reverse direction and for this unfortunate trend, he finds fault with the' **preferred treatment schemes'** for the economically disadvantaged classes, identifiable caste labels, as a result of which the caste system got a fresh lease of life.

Justice Dr. Arijit Pasayat and Justice K.C. Thakkar in Ashoka Kumar Thakur case are of the view that classification on the basis of caste in the long run has tendency of its stratification. According to Justice Dalveer Bhandari in the same case (supra), Caste divides the society, which results into violation and Caste based politics rages on. Thus, so long, caste based discrimination remains; the Constitutional goal of achieving a casteless and classless society would be merely a dream only, which would never be a reality. **Justice Bhandari** has very rightly remarked, which everybody would accept, that once the economic criteria removes the relatively wealthy class including depressed class, a **'class'** will remain, which shall be known as **'poor class'** and that class would share the same characteristic, irrespective of his caste. He also observed that 'the need for caste-based reservation has worn-out over time. He finds strong evidence of one's ability to move up in the society. According to him only economic criteria is a logical criteria. **Justice R.V. Raveendran** in Ashoka Kumar Thakur held that ***'Caste has divided the Country for ages….When the difference of status among the castes is removed, all castes will become equal. That will be the beginning for a casteless egalitarian society'.***

Jurist Nariman, while pleading in the Ashok Kumar Thakur case on the basis of the official data collected informed the Supreme Court apart from 27% reservation, about 9% OBC candidates joined merit quota and the students belonging to so-call backward classes are advanced, which indicates that the OBCs no longer remained educationally backward. Reservation for educationally advanced In Tamil Nadu, there is reservation of seats for 69% of seat as follows. As per the of-

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ficial data, he said that as against only 31 per cent seats available to the general category students for admission in Tamil Nadu, more than 09 per cent seats were occupied by the OBCs. This was the figure in 2005. Now after a decade, it must have gone up.

Caste Stratification Started During The British Period

When the Britishers came in India then taking undue advantage of the pitiable social and economic conditions of the Untouchables , the Catholic Missionaries targeted untouchable communities initially in South India for their conversion to Christianity, for which they established Roman Catholic Convent schools and hospitals and leprosy centres in several places in South India and started rendering free education and medical facilities to the Untouchables with love and affection, who were otherwise unable to get access to these services. They also rendered financial support to this class, because under Hindu society they were deprived of all such facilities even on payment. The children of Untouchables were not allowed admission in schools and the hospitals would not provide medical aid to these people. The exploitation was at the peak so much so that the Untouchables were not even allowed to walk on the streets in the day hours, so that their shadow may not fall on a Hindu Brahmin and other upper caste. To indicate that he is a Shudra, he had to wear a branch of tree on his head while moving outside his house. They were to live in the outskirts of the village. They were leading the life of slaves, were to bear all sorts of humiliation, insults, and physical tortures, and had to do all sorts of works for the upper-caste Hindus. They were not allowed to enter into the temples, hotels, restaurants, the Barbers would not cut their hairs, the teachers would not teach their children, and the priests would not perform the religious rites.

The policy of British missionaries succeeded tremendously. Rendering such services with kindness and affection and giving them respect, which were of immense value to these unfortunate people, who were subjected to hatred, abuse and all sorts of oppression, resulted in to frustration and revolt against the system, which in turn led to the large scale conversion by renouncing Hinduism. The missionaries would convince them to convert to their religion and promise them to guarantee respectable social status and advanced economic position in Christianity. Thus, they did a silent revolution in their field, the Hindu religious leaders did nothing to dissuade the Untouchables from renouncing Hinduism, as a result a large section of Hindu mass converted to Christianity first in South India, and its expansion took place throughout India. By conversion, they would get Christian names, which would enhance their social status, by financial support and free English medium convent education; the converts became free from the shackles of Hindu exploitation, oppression, humiliation, and insult. Although the Hindu religious leader failed to take a lead for social reforms to dissuade them from conversion, but several Princely States of South India and Maharashtra introduced several laws enabling the Untouchables to enter into the Temples and removal of several social disabilities for which they were subjected to. This resulted into a better position in the Hindu society. Some of the

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reforms introduced by the British Government also raised their economic and social conditions particularly in South India, Central India, undivided Bengal, Orissa, and part of Oudh. Similarly, Jatava community of Agra, whose hereditary profession was shoe-making, suddenly became rich because of industrialization resulting into large scale export of shoes to different parts of the Country and abroad claimed themselves as Khsatriyas. This trend of caste mobility was visible throughout India during the British regime, but when the Freedom movement against the British colonialism was started by the great freedom fighters, then with a view to sabotage the freedom movement, the Britishers introduced a policy of divide the Indian masses between upper caste and the untouchables. Since the freedom fighters came from Brahmin and other upper caste people and the untouchables were in majority in population, therefore with view to seek their loyalty, the British Government initiated several reforms for the welfare and development of Untouchables – like free education to their children, scholarship for them, and other measures of financial aid and grant. They had thought by conversion to Christianity and grant of special privileges to the Untouchables, they would themselves would not against the British and even if a section of them goes in support of the freedom movement, they could be easily dissuaded and they would remain loyal to the British. Although the policy of divide and rule was visible initially, but the same could not last further.

Pandit Jawaharlal Nehru's view appears to be more logical, when he says that every Caste system is preceded by a class system. Further, the Caste system is a theoretical division of Society.

Ambedkar, who had announced at the time of his and his 32 lacks Mahar followers' conversion to Buddhism that by renouncing Hinduism and embracing new religion, he and his fellow men had became free from the shackles from the yoke of Caste system. Dr. Ambedkar had renounced Hinduism and embraced Buddhism simply because he was deeply disappointed with the evils of the Caste system prevalent in the Hindu system, but the ghost of reservation overshadowed the Buddhist thought. This trend emerged only with a view to secure the fruits of reservation and other economic privileges provided to the Untouchables, now designated as Scheduled Castes/Tribes and other Backward Class.

Ambedkar had said in 1956 that the enlightened upper Castes Indians of were not happy with the practice of Untouchability and their anxiety was for the removal of untouchability, for which they had committed to do away with this evil practice at any cost and they were firm to do any sacrifice for the removal of this social stigma from the Hindu community. Thus, it was they who took a lead bring the Scheduled Castes, Scheduled Tribes and various other groups at par with the rest of the population. However, they had also an anxiety that the reforms and legal measures like reservation would tend them to perpetuate the evil system of Caste system to get the benefits of such special privileges for all time to come. Even great freedom fighter and the first Chief Minister of U.P., who subsequently became the Home Minister of India at a Seminar on 'Casteism and Removal of Untouchability' that the classes designated

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as **'backward'** in the Constitution would be reluctant to give away their status of backwardness even after having secured higher status- educationally, socially and economically, just with a view to get the special privileges for ever, whereas the special privilege was envisaged only for a short period so that the gap between the upper castes and depressed castes could be removed.

Ambedkar's view is that **'untouchability is the notion of defilement, pollution, or contamination.'** Mahatma Gandhi sees untouchability as pollution of certain persons because of their birth in a particular caste and family. As per V.R. Shinde, untouchables have to live outside in village and they are not given opportunity for progress. Their economic condition is poor. They are not given legal protection. However, this view of Shinde no longer remains valid in post-constitutional era because of continued legal, constitutional, political, and economic reforms.

NEW TREND OF UPWARD CASTE MOBILITY

Various Constitutional, legal and social reforms have a definite bearing on the social, political and educational status of those who had been the victim of the evils of the Caste system. It has brought enlightenment among them after getting prosperous a trend is reflected regarding upward mobility by claiming themselves to be the members of the higher castes and adopting sanskritized culture. In South India, such prosperous section of the Dalit population, who were suffixing **'iah'** in the last part of their surnames, began to discard such suffixes and suffixing their names with surnames like **' Rao, Reddy, Swamy, Balakrishnan'** etc. The surnames of Brahmins like **' Ayyiar, Iyer, Iyyangar, Radhakrishnan, Pillai, Namboodripad'** etc. are fading away because Brahmins in South India are loosing their political status and emergence of new and dominant power politics of former depressed class who are also economically and educationally advanced. Similarly, in North India, the newly prosperous caste people are discarding the use of their caste surnames and instead of that they are using higher caste surnames like- Singh, Sharma, Swami, Prasad, Narayan, Rao, Rai, Bharati, Ambesh, Shekhar etc., so as to give an indication that they belong to higher castes. As per a news report published in **"The Times of India,"** as many as 1.3 lacks people got their names changed and got themselves registered with the Government agency in Maharashtra, out of which a large number of the members of the Dalit community also got themselves registered with the Government agency for the change in their surnames indicating higher caste in a record period of one year. One such person namely Praveen Musahaar got his surname changed from Mushar to Manoos. When asked by the Press Correspondent of the news-paper regarding the cause of the change of his surname, he replied that the reason was to conceal his caste, because by using the caste surname, the people would look down upon him. He invented a new surname i.e. Manoos, a Marathi name which means **'Man'.** The report reads as under:-

"Praveen Musahar of Muimbai, wanted to breakthrough caste and community barriers. He dropped his surname entirely and opted for the more universal Manoos."

The report also reads as under:-

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"Others like Praveen Musahar dropped their surnames so as to avoid the bane of casteist attitudes.

Still others, like those with surnames like Fakte, Daruwalla, Kharabi, Nopen, Kachara, Lund, and Chutikar, wanted to alter their kismats, as data from the official government gazette show. They wanted a better shot at lie financially as well as socially after having endured years of name calling as well as outright bullying."

Here we find a peculiar phenomenon that on the one hand such socially advanced group from the Dalit community are changing their surnames and adopting sanskritized culture to apparently indicate them to be of higher caste, but on the other hand, while taking advantage of reservation or other privileges granted to the Dalits or backward classes, they claim themselves as Scheduled Caste, Scheduled Tribe or Backward Caste, as the case may be. The trend of caste mobility towards higher caste is a remarkably good sign of our progressive society, but at the same time to retain old caste just to continue to get the fruits of reservation would show that if this trend is allowed to grow, then caste would never be abolished and our Constitutional goal of achieving a **'Casteless and Classless society',** a vision of Mahatma Gandhi, Pandit Jawar Lal Nehru, **Dr. B.R. Ambedkar** and other great freedom fighters would never be realized particularly in view of the fact the neither our Constitution or any law recognizes Caste except the Scheduled Castes nor our Constitution or any law anywhere prevents or puts any restriction on any person, including the Scheduled Castes to his Caste. This trend of sticking to his Caste despite adopting higher caste surnames and having secured higher social to the education and the government of India and the University Grants Commission must seriously think about this issue.

It is a fact that the student's population has been multiplying many more times than the number of seats for admission, leaving behind a large number of unsuccessful candidates. It has brought the environment of sympathy, pressure, manipulation, politicking, welfare of a class, etc., forcing the educational institutions and authorities to allow the left outs, having a lower rank, to get admission through sidelanes and shortcuts of reservation. This has kept the deserving and more meritorious to helplessly watch their fate. It is time that these authorities must rise above the number games of reservation and fulfill their constitutional duty of educational excellence.

So ultimately, what we need? A minimum deserving all India reservation policy for a prescribed period with no further extension in any case or any ground what's over, strengthening this 'Unity and integrity' in India. Allow the right to equal opportunity in education to bloom for the best eligible talents. Make the people's right to education and standard of education vibrant, striving towards 'excellence', so that 'the nation constantly rises to the highest levels of endeavour and achievement."

In the words of a sociologist G. Shah , as quoted in Vasanth Kumar:

"Now, if the government changes the criteria of reservation from caste to class, persons from the upper strata of the lower castes who are otherwise not able to compete with the upper strata of the upper castes despite the reservations will be excluded from the white collar

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D.D. Basu , the judge, author and academician also does not believe in caste based protective discrimination. He is of the view that Article 15(4) is an exception to Article 15(1), thus the later could not override the former and reservation made in exercise of the enabling clause of Article 15(4) for the educational purposes or for that matter under Article 16(4) for providing reservation in public employment must be for a limited period and cautioned that any such privilege based on caste line would be counterproductive. He says:

"The principle underlying Art. 15(4) is that preferential treatment validly be given because of socially and educationally backward classes need it, so that in course of time they stand in equal position with the more advanced section of the society. It would not be in way improper if that principle were applied to those who are handicapped, but do not fall under Art. 15(4)."

Jyotica Pragya Kumar observes as follows:

"*The founding fathers of the Indian Constitution envisioned the policy of reservation consistently with the* **"generic principle"** *of equality of opportunity to all. This they did by confining the scope of reservation to the principle of* **'exception to the rule',** *and not vice versa. The exception was to remain restricted* "The **exception was to remain restricted** *to that segment of the society which for* **'historical reasons'** *was excluded from the main stream by social life purely on ground of communal consideration. Such a positive provision of reservation was not to be in perpetuity, for that was good neither for the direct beneficiaries nor for the envisaged social order. However, during the course of its operation, the envisioned perspective of reservation somehow or the other got lost on the way. With an all round clamour for more and more reservation, the exception is continually eating up the rule with scant regard for the Supreme Court bar of* **'more than 50% rule'**. *We are crediting ourselves for creating new divides by splitting society into an ever increasing number of castes, classes, tribes and minority groups with no time-constraints, do we mean that we are destined to become more and more backward-socially, economically and politically?*

The reservation policy was envisaged simply as a means to an end, the end being social justice. Alas! we have made it as an end in itself. The state thinks, its supreme and solemn responsibility is over once it meets the growing demands for reservation from the diverse groups, quite unmindful of the injury to the social system. It does not realise that thereby it sets in the vicious cycle of poverty. It only testifies, what Gunnar Myrdal said, **"a country is poor because it is poor."** *Unwittingly, it is promoting what Oscar Lewis termed the* **"culture of poverty."** *With complete disregard for the* **"maintenance of efficiency of administration,"** *the Indian system is increasingly becoming a big* **'drag.'** *Such enunciations as* **'sacrifice of merit'** *for* **'social justice'** *tend to convey as if* **'merit'** *and* **'social justice'** *are incongruent. Are they? Should not we look and locate our lost perspective!*

Eminent scholar **Prof. C.M. Jariwala** ,

"After five decades of the commencement of the Constitution of India, the time has come to impartially review the entire reservation system and see that the best talents get more place in the educational institution."

Reservations were made from time to time in view of exigencies to pacify the agitated class or groups. Such appeasement has done more damage than any good. In the expansion of reservations, the commercialisation of education has made the seats for admissions, a saleable commodity. This will not do justice

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status because of reservation, would ultimately prove counter-productive, thus this aspect deserves to be taken cognizance by our law-makers.

This trend reminds us the note of caution sounded by **Justice Chinnappa Reddy** in Vasanth Kumar case that

"Yet, even today, we find members of castes, communities, classes or by whatever name you may describe them, jockeying for position, trying to elbow each other out, and, viewing with one another to be named and recognized as 'socially and educationally backward classes', to qualify for the 'privilege' of the special provision ... Nowhere else in the world do castes, classes or communities queue up for the sake of gaining the backward stature. Nowhere else in the world is there competition to assert backwardness and to claim 'we are more backward than you'. This is an unhappy and disquieting situation, but it is stark reality."

The renowned jurist **Nani Palkhivala** did not agree with the ratio of Indra Sawhney, which identified caste as one of the basis criteria of backwardness. The views of **Nani Palkhivala** are worth quoting:

"The basic structure of the Constitution envisages that a cohesive, unified and casteless society. By breathing new life into casteism, the judgment fractures that nation and disregards the basic structure of the Constitution. The decision would revitalize casteism, cleave the nation into two- forward and backward – and open new vistas for intermecuie conflicts and fissiparous forces, and make backwardness a vested interest. It will undo whatever has been achieved since independence towards creating a unified, integrated nation. The majority judgment will revive casteism which the Constitution emphatically intended to end; and the pre-independence tragedy would be re-enacted with the role of reversed- the erstwhile under privileged would now become privileged."

jobs. And the persons from the lower strata of lower castes will not be able to compete with their counterpart of the upper castes. They too will be excluded. This will bridge the gap which is otherwise widening between the rich and the poor of the upper castes and it will strengthen their caste identity. It will wipe out the small poor strata of the upper castes at the cost of the poor strata of lower castes, and in the name of secularism. In course of time the upper caste will also become the upper class. Such a process would hamper the growth of secular forces."

But disagreeing with G. Shah, the Supreme Court relied upon the article of Prof. Upendra Baxi in '**Caste, Class and Reservations**: A Rejoinder to Ghansham Shah', which reads as under:

"If the poor can be operationally defined, categorised and sub- categorised and reservation benefits be stratified accordingly, would the scenario still haunt use? I think not."

In Vasanth Kumar, the Court held:

"If economic criterion for compensatory discrimination or affirmative action is accepted, it would strike at the root cause of social and educational backwardness, and simultaneously take a vital step in the direction of destruction of destruction of caste structure which in turn would advance the secular character of the Nation. This approach seeks to translate into reality the twin constitutional goals: one, to strike at the perpetuation of the caste stratification of the Indian Society so as to arrest progressive movement and to take a firm step towards establishing a casteless society; and two, to progressively eliminate poverty by giving an opportunity to the disadvantaged sections of the society to raise their position and be part of the mainstream of life which means eradication of poverty."

Justice Desai in Vasanth Kumar said:

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"Therefore, a time has come to review the criterion for identifying socially and educationally backward classes ignoring the caste label. The only criterion which can be realistically devised is the one of economic backwardness."

We found that the practice of segregation was also prevalent in U.S.A. Like untouchables in India, the Negroes also suffered the same in U.S.A. As a matter of fact, the Negroes were more sufferers than untouchables, because despite all sorts of exploitation and oppression, the untouchables were never made slaves, where as the Negroes were slaves and they were subject to sale and purchase like a commodity with no right whatsoever, not even right to live and right to property. In India, many movement were started by the great Hindu Saints, organizations like Arya Samaj and leader like Mahatma Gandhi to abolish the caste system in general and untouchability in particular, which brought spectacular result. In Karnataka and parts of Andhra and Tamil Nadu, the great saint Basaweshwara, had started a great mass movement namely Lingayat movement to abolish caste system. The followers were right from untouchable to Brahmins and the result was miraculous, both the untouchability and caste system were abolished in his life time, but alas, after his death, his followers themselves formed Lingayat as a Caste, and now Lingayat is notifies and recognized as a backward caste.

A very interesting point is that despite caste being an intrinsic feature of Hindu community or for that matter the Indian society, the word "Caste" has not been defined anywhere either in our Constitution or any Central or State legislation. Even this word did not find place anywhere by way of reference in our Constitutional or legal system. Further, the National goal is to achieve a casteless society. Prof. M.P. Jain has rightly observed that the Scheduled Castes and Scheduled Tribes are not castes within the ordinary meaning of caste.

Although it is a fact that such an evil which is prevalent in the Hindu society, but at the same it cannot be denied that the caste exists in Muslim, Christian and Sikh religions also. Even in Buddhist society also the caste exists, which is very peculiar, because Buddhism is an atheist religion- they do not believe in God and since caste is considered to a creation of God.

It may not be out of context to mention that Caste autonomy was recognized by the British. During the British regime, the courts would not interfere in caste disputes. The Warren Hastings's Judicial Plan, 1772 had also envisaged caste autonomy. The Bombay Regulation had barred the jurisdiction of the courts from caste matters. Even after the adoption and enforcement of our Constitution, some sort of autonomy like ex-communication exists. Article 26(2), which guarantees religious freedom, which also includes autonomy to Caste Panchayats in civil matters subject to the statutory laws on the subject. The Supreme Court in Saifuddin Saheb case held that ex-communication in Dawoodi Bohra community was valid, thus held the Bombay Prevention of Ex-Communication Act, 1949 to be unconstitutional being violative of Article 26(2).

We have referred to the anxiety expressed by the aforesaid 5-member Constitution Bench regarding the justification of con-

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tinuance of the Reservation by posing a question as to **'How long?'**. **Justice Dr. Arijit Pasayat and Justice C.K. Thakkar** in Ashoka Kumar Thakur case (supra) observed as follows:-

"One of grey areas focused on by the learned petitioners and the respondents is the ever perplexing question **"how long".** ..... *Admittedly, there is no deletion from the list of Other Backward Classes. It goes on increasing."*

Efforts were also made by the Central as well as the State Governments and also the affirmative actions were adopted by the Supreme Court to ascertain criteria of **'backwardness'**. After discussing the **Mandal Commission report,** the judgment of the Supreme Court in Indra Sawhney case on the enforcement of the Mandal Commission report and the law laid down by the Supreme Court in the latest case namely Ashok Kumar Thakur, the general consensus that arrived is that it is **'poverty'** and not the **'caste'**, which is the basis of **'backwardness'**.

The Creamy layer issue has also been dealt with specific guidelines issued by the Supreme Court in Indra Sawhney case in para 839 a list of exempted services from preferential treatment has been given. The list is as under:

1. Defence services including all technical posts therein but excluding civil posts.
2. All technical posts in establishments engaged to research and Development including those connected with atomic energy and space and establishments engaged in production of defence equipment.
3. Teaching posts of Professors – and above, if any
4. Posts in super specialties in Medicine, Engineering, and other scientific and technical subjects, and
5. Posts of pilots (and co-pilots) in Indian Airlines and Air India.

The Backward Castes Identified by The Mandal Commission

The Kaka Kalelkar Commission, appointed by the Government of India, had identified 2399 backward castes whereas the **Mandal Commission** has identified, 3743 in 1980 and thus during a period of 25 years it has gone up from 2399 to 3743 i.e. increase of 344 castes. In U.P. alone initially 49 castes were declared as **OBCs** , but now it has gone to 76. Thus, not a single Caste has been excluded from the list, which is contrary to mandate prescribed in the NBCC Act, 1993. The orientologists, philosophers and scholars like renowned author of **'Geeta Rahasya'** and Freedom Fighter **Lokmanya Bal Gangadhar Tilak, Dr. S. Radhakrishnan, the former President of India, Monier Williams, Toynbee, Max Muller** etc. defined **'Hindu'** in their way with authority. The scholarly opinion of Chief Justice Gajendragadkar expressed in Yagnapurush Dasji has also been discussed. The most authentic and convincing view comes from the great scholar Bal Gangadhar Tilak, who in his treatise **"Gita Rahasya"** said: *"Acceptance of the Vedas with reverence; recognition of the fact that the means or ways to salvation are diverse; and realization of the truth that the number of gods to be worshipped is large, that indeed is the distinguishing feature of Hindu brings out succinctly the broad distinctive features of Hindu religion."*

The Six philosophies of Hinduism-the

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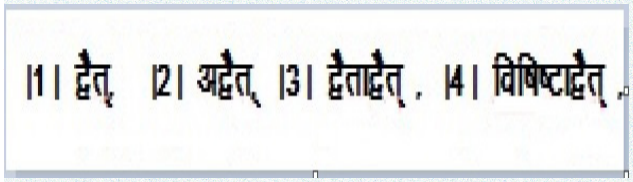
Khad Darshan have also been studied. The interpretations of



great Saints like Shankar, Ramanuj, Vallabh and Madhva in order to understand the concept of Hinduism, which have been relied upon by the Supreme Court through **Chief Justice Gajendragadkar** in Yagnapurush Dasji case have been referred to. The **meaning and definition** given by the Supreme Court in the case of CWT v. R. Sridharan and M.P. Gopal Krishnan Nair v. State of Kerala , in which it has been observed that *'A Hindu may be a theist or atheist, an idolater or iconoclasts, who attacks established customs and values of the tenets of Hinduism, these having faith in the Vedas or Upanishads or calling them hypocrites, those believing in the oneness of God or those believing in crores of God or Goddesses, those having faith in casteism or denounce the same is a Hindu' have been covered in this work.'*

The framers of our Constitution were aware of this distinctive and unique feature of Hindu religion that is why they did not define the term Hindu in Article 25 of the Constitution envisaging the guarantee of freedom of religious Article, although the word **'Hindu'** appears in sub-clause (b) of clause (2) of Article 25. In refraining from defining the term **'Hindu',** the framers of our Constitution mentioned in Explanation II to Article 25 as *"the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religions institutions shall be construed accordingly."*

The above discussion leads to the conclusion that if one is a Hindu, he has just to declare as such. According to a Kerala High Court judgment , a person declaring himself a Hindu will be considered a Hindu.

Caste mobility was in vogue as back as in Vedic period. Swami Vivekanand strongly favoured this. He exhorted the people from the lower castes to raise themselves as Brahmins and assured them that no one can stop them from proclaiming themselves as Brahmins. A member of Scheduled Caste or Backward Class community has a right to move upward and similarly, a member of upper caste community is at liberty to migrate to the Scheduled Caste or Backward Class Community subject to the condition that in the former case, the person shall loose the benefits of reservation and in the latter case, the person moving down ward shall not be entitled to any privilege of reservation due to that class of community, but the impediment in bringing out this radical change is reservation.

Representation of The Reserved Category Persons in Public Employment

However, as per the data supplied by Government of India regarding the representation of SCs/STs and OBC's in public employment in the Central Government, it is 18.72 per cent of the OBCs and 12.55 per cent of the SCs/STs out of 15,71,638. In U.P., the quota is 21 per cent for the

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SCs, 2 per cent for the STs and 27 per cent for the OBCs. Thus, the cap in the Central as well as the State Governments employments including its undertakings and autonomous bodies is 50 per cent. However there is are exemptions regarding appointments in Scientific/Technical posts for conducting organizing, guiding, and directing research which are above the lowest groups 'A' one level.

As per a report in **"The Times of India"** representation of SCs and STs in the Central Government Services as on January 1, 2011 as follows:-

Group 'A'	**SCs 11.1%**	**STs 4.6%**
Group 'B'	**SCs 14.3%**	**STs 5.5%**
Group 'C'	**SCs 16.0%**	**STs 7.8%**
Group 'D'	**SCs 19.3%**	**STs 7.0%**

This figure is apart from the appointments/selections of SCs and STs made in open category on the basis of their merit.

Hence as per the data referred to above, where SC representation in Group 'A' is 11.1%, thus there is short fall of 4.9%, but if we exclude those posts where the rule of reservation does not apply which comes to around 2%, the short fall comes down to 2.9%. Further, the data is 01.01.2011. It may be reasonably presumed that in further one year, the short fall would come down considerable and the short fall would be negligible. So far as the position in Group 'B', 'C,' & 'D' are concerned, it is almost full. In Group 'B' it was 14.3% as on 01.01.2011 and by now it must have reached its required quota. In Group 'C' it was 16% and Group 'D' it was 19.3% so the required quota is full in B, C & D categories. Same is the position STs, where reservation is 7.5%. If we consider the data furnished by Mr. Fali. S. Nariman in Ashok Kumar Thakur's case above the picture becomes move clear this point.

Prof. Udai Raj Rai says that in fact the quantum of reservation is much more than 50% cap. He says:

"The rule of 50 per cent limitation on reservation has now acquired a sanctity since the nine-judges bench decision in Indra Sawhney. But the rule is laces with some explanatory provisos, and it is necessary that a reader should know about them. First, all available places are divided in two categories- those in the social reservation category and those in the remaining category. It is this reservation or division which is 50-50 and it is known as vertical reservation. This reservation is meant exclusively for scheduled castes, scheduled tribes and other backward classes. In addition, other permissible reservations, which are expected to be very few and limited, are to be adjusted against each category, depending on the category to which the beneficiary belongs. This is known as horizontal reservation. Second, even the eligible beneficiaries of the social reservation are entitled to compete for general seats and those who successfully compete for some such seats are not to be counted against the 50 per cent social category seats. In other words, 50 per cent social category reservation is in addition to that."

By means of the Constitution (First Amendment) Act, 1951, the Zamindari was abolished a result of which the tillers were given the ownership of the land they had been tilling. Thus, tillers became landowners, who were generally Untouchables and backward class community. In 1974, After the nationalization of 14 leading private Banks several welfare schemes were evolved by the Government of India to provide loans on easy terms to the Scheduled Caste, Scheduled Tribes, and

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other Backward Classes for agricultural purposes, doing business, industry, and scholarships for higher education to their children. Further, because of attaining higher social status due to education, suffixing surnames indicating upper castes, adoption of Sanskritized culture and the Government's policy to encourage inter-caste marriages, the practice of inter-caste marriage has rapidly developed. Thus on account of better economic and social status and practice of inter-caste marriages, the caste system is rapidly being diluted and is losing its existence and efficacy. Now a son of a Mochi (Cobbler), Dhobi (Washerman), Kumhar, (Eartenpot maker), Kanhar (Domestic servant), Lohar (Blacksmith), Darzi (Tailor), Machuara (Fisherman), Kalwar ((Liquor merchant), Bhangi (Scavenger) etc. would not adopt his father's or ancestor's profession. By getting higher social status, financial position, and higher education, he would become a Government servant including posts like I.A.S., judges, lawyers, doctors, engineers, professors, teachers etc. He would also enter into business, trade or profession and politics and secure political power.

One interesting trend has been reflected recently, in which the Dalit Indian Chamber of Commerce and Industry, an organization of the Scheduled Caste and the Scheduled Tribe entrepreneurs across the Country, has vehemently opposed reservation provided to them on caste line. It has raised a slogan- **"FIGHT CASTE WITH CAPITAL."** The organization says that the Scheduled Castes and the scheduled Tribes community no longer requires reservation. The founder of the organization Chandra Bhan says:
"People have long been deprived of economic and social rights don't need reservation to grow. Instead, they need ample business opportunities to prove their merit…. The modern trade system offered equal opportunities to all depending on their skill contrary to the traditional trade system where all powers and money were vested in the hands of one. The old system promotes casteism while the new system will allow everyone to grow."

As a matter of fact, perhaps in educational institutions when a student takes admission or in Service Book when a person enters in Government Service, knows whether one is required to declare his caste, except Scheduled Castes. Even in court records like affidavits, sale-deeds, partnership deeds, power of attorneys, revenue records, ration cards, identity cards, PAN cards, Bank records, Passports etc., Caste column does not exist. Even in social circles, no one ask caste from the other and asking caste is deprecated and is termed as uncivilized culture.

Our Parliament, for further ameliorating the economic condition of this class, amended the Constitution in 1979 by inserting new provisions in Article 38 as one of the Directive Principles of State Policy and thereafter the Central as well State Governments envisaged several benevolent policies for the weaker section with a view to ameliorate the socio-economic and educational conditions. After the nationalization of 14 premier Banks the loan facilities were provided to the children of this community for their higher studies like Engineering, Medical, Science and technology and going abroad for further higher studies in easy terms and lower interest rates. Further the landless and indigent labourers and farmers are also eligible for securing loan.

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The Position of Negroes in U.s.a.

While comparing the conditions of Negroes of U.S.A. and the Scheduled Castes of India, Prof. Udai Raj Rai , is of the view that both should not compared, because on the one hand the Negroes are in minority in U.S.A. , whereas the depressed class in India is in majority in population, thus they wield a strong political power. Prof. Rai says:

"*Quite often a parallel is sought to be drawn between the United States and India. But one thing has to be remembered. The suffering class in the USA was in minority, which did not have enough political clout. The Supreme Court in the United States has ample freedom while deciding the cases of* **'benign discrimination'**. *On the other hand, the castes and communities which are the beneficiaries of reservation in India constitute an overwhelming majority. This, on the one hand, makes it highly inequitable and intolerable to let them remain in a state of continued deprivation. On the other hand, in a democracy, numbers are the source of political power and the Court decisions have to be necessarily sensitive to this reality. Consequently, judges have to make a tight rope walk. They have to be vigilant that power holder do not become oppressive by abusing their power.*"

However, while discussing the need of providing protective discrimination to the depressed class and its effect, we need to compare the position of the Negros, who were also subjected to much more degree of exploitation and oppression and they were much more sufferers than the 'untouchables' of India, because despite various kinds of exploitation, the 'untouchables' were never made slaves, whereas the Negroes were made slaves who were sold and purchased like a commodity. The slavery Negroes is a stigma for U.S.A. that had otherwise led the way in protecting individual rights. The practice of slavery was started in 1619 and the Negroes were bought, sold, and used as personal property. Till 1808, as per Article 1 of the initial Constitution a slave would be counted as three-fifths of a person for representation purposes; Other forms of discrimination also were common. Voting qualifications, for example, were quite restrictive: only men could vote, and in some States only men who owned property could vote, thus depriving the Negroes from voting. At least this degree of discrimination and exploitation was never prevalent in our Country. However, U.S. abolished this evil by enacting the 14th Amendment of the U.S. Constitution and launching various affirmative actions in favour of the Negros. Initially, after the 14th Amendment, the U.S. Supreme Court evolved a theory of 'separate but equal', but taking a radical and progressive stand, it revoked this doctrine and guaranteed equal treatment to the Negroes in all walk of life- schools, colleges, universities, rail, road, hotels, restaurants, clubs etc., but the most important aspect is that neither the U.S. Congress nor the U.S. Supreme Court ever envisaged any type of reservation as is practiced in India. The result is that now there is no discrimination of any sort of the Negroes. Now the Negroes and Whites are moving ahead hand to hand both the groups are cooperating each other in shaping the better and future society of the U.S.A. and the U.S. society has been able to achieve absolute equality between the Whites and the Negroes. Actually, the U.S. Government nowhere provided any protective discrimination in favour of Negroes. What they did that they gave equal treatment to the Negro students in education right

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from primary to higher education and also in elections and public employment, whereas in India we have not only given equality to the class which were known as untouchables but also enacted several legislations for the economic, educational and social development for them. We not only brought the different class at par with the upper castes or socially and education dominant class of society, but also by making Constitutional provisions by providing protective discrimination in favour of the depressed class. Thus, we see that in U.S.A., they have achieved the goal of removing exploitation of the Negroes and bring them at par with the rest of the society without resorting to any type of reservation; a controversy is going on regarding justification of reservation. Thus, time has come to review the policy of reservation afresh.

The abolition of Caste is inevitable to build a secular, strong and prosperous Nation

In the first Parliament the great freedom fighter, parliamentarian and Statesman Acharya Kripalani had moved a private bill in the Parliament seeking to remove caste columns from all government records particularly revenue records and official documents like application forms, scholars registers and other registers maintained in school, colleges and other educational institutions like universities, research laboratories and employment application forms for government or non-government services. The idea behind the bill was to establish a casteless society. Acharya Kripalani was of the firm view that if this bill were enacted, enforced, and implemented in the country then by the next generation people would forget about their caste thus resulting into a new era of casteless and egalitarian society, but unfortunately, the private Bill could not be passed in the Parliament. However, this is high time that such a mechanism be evolved by our Parliament to achieve the cherished national goal of achieving a casteless and egalitarian society. The views of Justice J.L. Kapur in Suri Dora case certainly gives a solution to this problem by abolishing caste itself by granting statutory right of caste mobility by enacting a Law by Parliament, or remove caste columns from all official documents – Central Government, State Government, Public Sector Undertaking, Statutory authorities, local bodies, educational institutions etc. Reservation on all other grounds except **'Caste'** can also be a means. Presidential reference under Article 143 to the Supreme Court on the question of caste mobility would further give an alternative. Even a drive on national level exhorting people to exercise their Fundamental Right to "**freedom of conscience**" under Article 25(1) of our Constitution on mass scale, which enables a person or expressly giving him a right of caste mobility would certainly usher a new era creating a caste-less society.

ACKNOWLEDGEMENT

A part of the Thesis for the partial fulfillment of the degree of Ph.D. from Dr. R.M.L Avadh University, Faizabad (U.P.) under the supervision of Dr. Yashwant Singh, Ex-Dean, Faculty of Law, Dr. R.M.L. Avadh University, Faizabad.

REFERENCES

1. A part of the Thesis for the partial ful-

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fillment of the degree of Ph.D. from Dr. R.M.L Avadh University, Faizabad (U.P.) under the supervision of Dr. Yashwant Singh, Ex-Dean, Faculty of Law, Dr. R.M.L. Avadh University, Faizabad.

2. AIR 1959 SC 318.

3. AIR 1963 SC 649/(1963)Supp(.I) SCR 439.

4. (1964) 6 SCR 368/AIR 1964 SC 1823.

5. (1968) 3 SCR 595/AIR 1968 SC 1379.

6. AIR 1969 SC 1 .

7. AIR 1971 SC 2303/ (1971) 1 SCC 38.

8. (1972) 1 SCC 660.

9. (1976) 3 SCC 730/(1977) 1 SCR 194.

10. AIR 1985 SC 1485/(1985) Supp. SCC 714.

11. 1992 SCC (L&S) Supp.(1)/1992 Supp. (3) SCC 217.

12. M.P. Jain (Prof) .: Indian Constitutional Law-Fifth Ed. 2003 Vol. 1 p.1121.

13. AIR 1964 SC 179/(1964) 4 SCC 680.

14. AIR 1976 SC 490/(1976) 3 SCC 310.

15. Supra f.n. 33.

16. Supra f.n. 36.

17. AIR 1964 SC 179/(1964) 4 SCC 680.

18. Akhil Bhartiya Shoshit Karmachari Sangh (Rly) v U.O.I. AIR 1981 SC 298/ (1981) 1 SCC 246.

19. G.S. Ghurye (Dr).– Caste and Class in India Third Ed. 1957.

20. Mahendra P. Singh (Prof.) - V.N. Shukla's Constitution of India: Tenth Ed. 2001 Reprint: 2003 p. 82.

21. Anirudh Prasad (Prof.) – Reservational Justice to Other Backward Classes (OBC), 1997 Ed. p.16.

22. Mahabharata- Anusasana Parva 163.8, 26, 46: .

23. Mahabharata- Anusasana Parva 143.50.

24. Collection of Works of Swamy Vivekanand.

25. Dr. (Sir) S. Radhakrishnan - Religion and Society – ASIN 8172231636 p. 129-13.

26. Annie Besant - India: Essays and Lectures Vol. IV - London. The Theosophical Publishing Co. p.43-50.1895 & Prof. Nicol Macnicol - Is Christianity Unique p. 52. Refer to Petition: Christians against Proselytism.

27. Lower caste Hindu Saints - wikipedia. org. Watch video - Brahmins in India have become a minority .

28. Supra f.n. 421 at p. 39.

29. Supra f.n. 92 at p. 132-38.

30. Ibid. at pp. 143-52.

31. N.K. Dutt - Origin and Growth of Caste in India-Vol. I Firma K.L. Mukhopadhyaya, Calcutta, 1968 p. 21.

32. Dr. B.R. Ambedkar- Selected Speeches and Writings, Vol. 5, Government of Maharashtra, 1989, pp. 445-78.

33. O P Gupta -The Futility of Religious Conversions – via-*http://www.hinuwisdom.info/articles_hinduism/281.htm*. O.P. Gupta: :Caste and Bhagawad Gita. http:/www.godafultruth.net/ visited on

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30.8.2012.

34. Id.

35. Supra f.n. 215.

36. Ibid at p.495 para 149.

37. Supra f.n. 435 at pp. 188-90.

38. Soma Wadhwa, S.Anand, Charubala Annuncio and Sutal Mukerjee - Dalit Conversion to Budhism .

39. Prof. M.P. Jain: Indian Constitutional Law-Fifth Ed. 2003 Vol. 1 p.1121.

40. Supra f.n. 21 .

41. Supra f.n. 215 .

42. Id.

43. Id.

44. Dr. B.R. Ambedkar - Castes in India: Their Mechanism Genesis and Development -Dr. Babasaheb Ambedkar Writings and Speeches: Bombay Govt.-1979 pp. 188-90.

45. The Times of India, Lucknow Ed. Dated 29th May 2011 at p. 1.

46. Id.

47. Id.

48. Supra f.n. 21.

49. Supra f.n. 22.

50. Nani Palkhivala- We The Nation-1994 Ed. p. 179.

51. D.D. Basu- Commentary on Constitution of India 2nd Ed. 2007 p.1824.-26.

52. Jyotica Pragya Kumar-Policy of Reservation: Its Envisioned Perspective: Indian Law Institute, Vol.39, 1997 p. 337.

53. C.M. Jariwala (Prof.) - Reservation in Admission to Higher Education, Development and Direction:: Indian Law Institute Vol. 42, 2000, pp. 215-231.

54. G. Shah- IPW January 17, 1983, quoted by the Supreme Court in K.C. Vasanth Kumar v. State of Kerala.

55. Upendra Baxi (Prof.) - Caste, Class and Reservations: A Rejoinder to Ghansham Shah: quoted by the Supreme Court in K.C. Vasanth Kumar v. State of Kerala

56. Id at 549 para 277.

57. [56]प्रामाण्यबुद्धिर्वेदंपु साधनानाममेकता ।
उपास्यानामनियमषचैतद्धर्मस्य लक्षणम ।।

58. (2005) II SCC 45.

59. 1975 KLT 55.

60. The Times of India -Lucknow Edition, Sunday 9th September 2012 p.4

61. Udai Raj Rai (Prof.) - Fundamental Rights and Their Enforcement: PHI Learning (P) Ltd., New Delhi-2011 p. 614.

62. The Times of India, Lucknow Edition-Dated 15.10.2012 p. 1.

63. Constitution (Forty-fourth Amendment) Act, 1978 Sec. 9 (w.e.f. 20.6.1979) inserted a clause namely Clause (2) in Article 38 after clause (1), which reads as under:-(2) The State shall, in particular, strive to minimize the inequalities in income, and endeavour to eliminate in equalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people

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residing in different areas or engaged in different vocations.

64. Udai Raj Rai- (Prof.) Fundamental Rights and Their Enforcement: PHI Learning (P) Ltd., New Delhi-2011 pp. 598-599

65. AIR 1959 SC1318.

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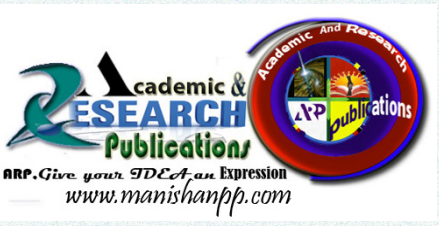

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Contested over one dozen landmark cases resulting into laying down the laws by the High Court, Lucknow Bench, Lucknow, which were reported in various Law Reports.

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INTERNATIONAL SEMINAR : Paper on "ROLE OF JOURNALISTS IN AVERTING DANGERS OF WAR IN INDIAN OCEAN "International Organization of Journalists, Paris at Delhi in Sept.1984..

NATIONAL SEMINARS; Paper on "LAW & SECULARISM IN INDIA" Indian Academy of Social Science at Varanasi in 1976, Paper on "FORMULATION OF LEGAL AID CLINIC- SOME SUGGESTIONS" Seminar Organized by Govt. of U.P. on 18-10-1981,Paper on **"STREAMLINING THE ADMINISTRATIVE MACHINERY"-** *UGC Seminar at B.H.U. Varanasi on 05-02-1977, Paper on "IDENTIFYING LEGAL IMPEDIMENTS ON ACCELERATING RURAL DEVELOPMENTS IN INDIA " Seminar on Indian Academy of Social Sciences , Allahabad , at Kanpur on 02-08-1978, Paper on "RURAL DEVELOPMENT & ENVIRONMENTAL LAWS" National Seminar on National Environmental Science Academy & Annamalai University at Waltair in June , 1989, Paper on "RIGHT TO RECALL THE LEGISLATORS"- Seminar of Indian Academy of Social Sciences, Allahabad on 14-12-1983, Paper on* **"AIR & SOUND POLLUTION IN INDIA"** *Seminar of Legal Aid & Advice Board . U.P. at Lucknow on 19-03-1983, Paper on "SOCIAL JUSTICE AND LEGAL AID MOVEMENT"- University Grants Commission Seminar at Faizabad on 06-12-1986, Paper on CHALLANGE OF COMBATING THE HAZARDS OF WATER POLLUTION-A LEGAL PERSPECTIVE: National Seminar organized by Dr. R.M.L. Avadh University, Faizabad in 27-7-2013 and Paper on* **EVOLUTION AND DEVELOPMENT OF HUMAN RIGHTS AND ITS ENLARGEMENT THROUGH JUDICIAL DELINEATION***: UGC Seminar at Faizabad on 07-12-1013.*

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Professor (Dr.) Usha Tandon is the **Head of Campus Law Centre, University of Delhi**. Her teaching experience spans for a period of 25 years. She served on deputation as Director of a Five Year Law School- Vivekananda draprastha University, Delhi (2005). Her areas of interest include Environmental Law, Gender Justice, Family Law, and Population Law. She has been working, since 1991, on the issues of human development and Population Law with special reference to the human rights of women and right to wholesome environment. Her book on Population Law in India is the only book of its kind which covers various population issues through the perspective of law and has been referred by the American report **"Women of the World: Laws and Policies Affecting their Reproductive Lives- South Asia"** Centre for Reproductive Rights (ed) New York (2004). She has been the Fellow of Max Plank Institute for International and Comparative Law, Hamburg, Germany,(2011); International Institute of Human Rights, Strasbourg, France, (2007) and has to her credit Ciedhu which specializes her for the university human rights teaching. She has the honor of being invited by the Centre for Human Rights and Humanitarian Law, American University Washington College of Law, USA to pursue research on Human Rights and Women's Reproductive Health, (2004). She has also been invited by Korea Environment Cooperation to speak on **"Green India Mission"** in the 6th Policy Consultation Forum of the Seoul Initiative Network on Green Growth: Economic System Economy" in Busan, Republic of Korea,(2011), organized by Economic and Social Commission of Asia and Pacific (ESCAP) in cooperation with Ministry of Environment of Republic of Korea. Recently, she has been invited by the Royal Court of Bhutan, as a Guest of Honour to participate in the inauguration of new Supreme Court of Bhutan, by Indian Prime Minister in June, 2014.

As an expert from India, she participated at Seoul in an International Symposium on Constitutionalism in Asia organised by the Constitutional Court of Korea (August, 2014). As an expert from India, she also participated in the Kathmandu School of Law, Nepal in the deliberations on the curriculum for **"Human Rights of Women"** (2003). She has 37 research papers to her credit published in the journals of international and national repute. Her published work got applauded by the Supreme Court of India (2003). She has presented papers at International Conferences in various countries including USA, France, Germany, China, Singapore, South Korea, Malaysia and Nepal. She has been supervising research work for LL.M. and PhD scholars and has successfully completed the research projects sanctioned by the University Grants Commission, Delhi and the National Commission for Women, Delhi. She holds professional memberships with Population Association of America, MD, USA; South Asian Law Schools Forum for Human Rights (founder member) Kathmandu; Institute for Constitutional and Parliamentary Studies, New Delhi (life member), All India Law Teachers Congress, New Delhi (founder member); Indian Law Institute, New Delhi (life member) and Indian Society for International Law, New Delhi. **Currently she is the Editor-in-Chief of Journal of the Campus Law Centre and Member, Editorial Board of US-China Law Review.**

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I am Manisha Verma completed my B.Tech. in Electronics Engireering from Pune University and join as a R&D Engineer in Indian Telephone Industry, developed a system "Power Distribution Automation". This system is designed for handling huge electrical power. There is a need to transport quantum of power efficiently with reliability to the end users. PDA is designed on integrated system concept. It includes control, monitoring and protection of the distribution system. Basically microprocessor and microcontroller based system designed in assembly language MCS-51 family through RF communication and DOS Operating System. After that worked at Cat Vision Ltd. Designed project band trap and channel trap for satellite communications equipment, RF Modem designed HDLC protocols(Half Duplex)high speed data transfer ABM mode using (GMSK) FM Technology.

Then join TCS Ltd. as software engineer as contract basis where assigned a project on Bharat Electronics Limited Ghaziabad where we had to designed and developed **SIMULATOR** for P17 of **Combat Managment System(CMS)** in language C++ and Linux operatng system. P17 is the name of the ship of Indian naval force which lassed with radar, sonar, torpedoes, gun, missiles, aircraft. Basically, simulator was designed for the training, testing and evaluation. Where I have implemented Sig Alarm on event logger on Brahmos missile launcher successfully. Brahmos was the biggest missile launcher which consist 240 missile. Basically Combat Management System (CMS) worked on time share mode concept and facing the problem of signal delay due to timer priority setting and Sig Alarm is not the timer, it was the interrupt which handled the situation without delay.

After finishing my contract in TCS, I started my own software development firm and successfully designed various data base driven management system like Advocate Management System, Society Management System, Form Management System, School Management System on using platform .NET in front end and MS Access in back end on Windows Operating System.

After that suddenly I got opportunity to work with founder and Vice President of NESA, Prof. TRC Sinha for technical support as well as publication editor in NATIONAL PRINTER & PUBLISHER. Actually he wanted to hand over his dream to me in order to get free to leave this world peacefully. As I promised him I started **Academic And Research Publications** with collaboration of JPMS Society, is a Society registered under the Societies Registration Act and its Registration No. is 1649/1986-87. I am also the director of JPM Computer Institute, a company incorporated in 2009 under Company Act 1956. It is an authorised affiliated COMPUTER EDUCATION CEI of RAJEEV GANDHI COMPUTER SAKSHARTA MISSION (R.G.C.S.M.) assigned branch code UP- 240.

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At present, Dr. Singh is Dean, School of Legal Studies, Assam University, Silchar. Before joining Assam University to the post of Professor in 2011 Dr. Singh served Mahatma Gandhi Kashi Vidyapith, Varanasi where he held the position of Head & Dean for many years. He was also the Director, Legal Cell, Mahatma Gandhi Kashi Vidyapith. Dr. Singh has also honoured as chairperson and resource person in conferences, seminars, symposiums and workshops. Dr. Singh is the editor of several journals.

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He has undergone various training program from the reputed Universities and Academic Staff Colleges,i.e. refresher courses ,professional development courses and legal training – BHU, ISIL ,NLU New Delhi, NLSIU Bangalore, NUJS Kolkata, CNLU Patna, Allahabad university, ASC Lucknow, ASC Kumaun University Nainital(UK), Indian Institute of Public Administration, New Delhi, NIRD, – Patna. Dr. Roy has credit of participation and presentation of research papers in more than 100 national as well as international seminars / workshops in India. He has delivered Keynote address and chaired the session in many seminars. He has been seminar coordinator also. He is Academic and Research coordinator at CNLU. He has contributed research papers in journals – Ideal Research Review, Voice, Chotanagpur Law Journal, Nayay Sandesh, Juris Ray, Relevance, PCCR, A Journal of Asia for Democracy and Development, Assam Law Times, Social Vision, International journal of psychology and education and chapters in various books, i.e. Creative activities and the law, Celebrating satyagraha, Changing dimension of women empowerment etc on different Socio-economic-politico-legal issues totaling around sixty. He is advisor and editor of journals also. He has authored books –"Lectures on Intellectual property Law", "An analytical study of Intellectual property Rights in India" and "Intellectual property Rights—A Prismatic View(Ed)". He is academic and research coordinator in the University and has produced one Ph.D. in 2013. Dr. Roy has been member of various Academic organizations / associations in India. , i.e. ISC, ISLE, ICA, IIPA, AILTC, AITEA, etc. The hunger for learning is continued with a mission to build up 'entrepreneur professionals' in the university and a message that knowledge is not only power or instrument of power rather it makes a man 'human'.

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Volume No. 2, Issue No. 1, 2015 January 2015

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